

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP,)
Petitioner,)
v.) No. 23-719
NORMA ANDERSON, ET AL.,)
Respondents.)
- - - - -

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9
10 Washington, D.C.
11 Thursday, February 8, 2024
12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 10:08 a.m.
16

17 APPEARANCES:
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19 of the Petitioner.
20 JASON C. MURRAY, ESQUIRE, Denver, Colorado; on behalf
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22 SHANNON W. STEVENSON, Solicitor General, Denver,
23 Colorado; on behalf of Respondent Griswold.
24
25

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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 23-719, Trump versus Anderson.

5 Mr. Mitchell.

6 ORAL ARGUMENT OF JONATHAN F. MITCHELL

7 ON BEHALF OF THE PETITIONER

8 MR. MITCHELL: Mr. Chief Justice, and may
9 it please the Court:

10 The Colorado Supreme Court held that
11 President Donald J. Trump is constitutionally
12 disqualified from serving as president under
13 Section 3 of the Fourteenth Amendment. The Colorado
14 Supreme Court's decision is wrong and should be
15 reversed for numerous independent reasons.

16 The first reason is that President Trump is
17 not covered by Section 3 because the President is not
18 "an officer of the United States" as that term is
19 used throughout the Constitution. "Officer of the
20 United States" refers only to appointed officials,
21 and it does not encompass elected individuals, such
22 as the President or members of Congress. This is
23 clear from the Commissions Clause, the Impeachment
24 Clause, and the Appointments Clause, each of which
25 uses "officer of the United States" to refer only to

1 appointed and not elected officials.

2 The second reason is that Section 3 cannot
3 be used to exclude a presidential candidate from the
4 ballot even if that candidate is disqualified from
5 serving as president under Section 3 because Congress
6 can lift that disability after the candidate is
7 elected but before he takes office. A state cannot
8 exclude any candidate for federal office from the
9 ballot on account of Section 3, and any state that
10 does so is violating the holding of Term Limits by
11 altering the Constitution's qualifications for
12 federal office.

13 The Colorado Supreme Court's decision is no
14 different from a state residency law that requires
15 members of Congress to inhabit the state prior to
16 Election Day, when the Constitution requires only
17 that members of Congress inhabit the state that they
18 represent when elected.

19 In both situations, a state is accelerating
20 the deadline to meet a constitutionally imposed
21 qualification and is thereby violating the holding of
22 Term Limits. And in this situation, a ruling from
23 this Court that affirms the decision below would not
24 only violate Term Limits but take away the votes of
25 potentially tens of millions of Americans.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Mitchell, would you --
3 you didn't spend much time on your argument with
4 respect to whether or not Section 3 is
5 self-executing, so would you address that? And --
6 and in doing that, your argument is that it's not
7 self-executing, but then, in that case, what would
8 the role of the State be, or is it entirely up to
9 Congress to implement the disqualification in
10 Section 3?

11 MR. MITCHELL: It is entirely up to
12 Congress, Justice Thomas. And our argument goes
13 beyond actually saying that Section 3 is
14 non-self-executing. We need to say something more
15 than that because a non-self-executing treaty or a
16 non-self-executing constitutional provision normally
17 can still be enforced by a state if it chooses to
18 enact legislation.

19 The holding of Griffin's Case goes beyond
20 even that by saying that a state is not allowed to
21 implement or enforce Section 3 of the Fourteenth
22 Amendment unless and until Congress enacts
23 implementing legislation allowing it to do so. So,
24 under Griffin's Case, which we believe is correctly
25 decided -- the Anderson litigants disagree with us on

1 that point -- but, if this Court were to adhere to
2 the holding of Griffin's Case, there would not be any
3 role for the states in enforcing Section 3 unless
4 Congress were to enact a statute that gives them that
5 authority.

6 CHIEF JUSTICE ROBERTS: Counsel, what if
7 somebody came into a state secretary of state's
8 office and said, I took the oath specified in Section
9 3, I participated in an insurrection, and I want to
10 be on the ballot? Can the -- does the secretary of
11 state have the authority in that situation to say no,
12 you're disqualified?

13 MR. MITCHELL: No, the secretary of state
14 could not do that, consistent with Term Limits,
15 because even if the candidate is an admitted
16 insurrectionist, Section 3 still allows the candidate
17 to run for office and even win election to office and
18 then see whether Congress lifts that disability after
19 the election.

20 This happened frequently in the wake of the
21 Fourteenth Amendment where Confederate
22 insurrectionists were elected to Congress, and
23 sometimes they obtained a waiver; sometimes they did
24 not. And each House would determine for itself
25 whether to seat that elected insurrectionist because

1 each House is the sole judge of the qualifications of
2 its members.

3 So, if a state banned even an admitted
4 insurrectionist from the ballot, it would be adding
5 to and altering the Constitution's qualifications for
6 office because, under Section 3, the candidate need
7 only qualify during the time the candidate holds the
8 office to which he's been elected. And under Your
9 Honor's hypothetical, the secretary of state would be
10 demanding essentially that the candidate obtain a
11 waiver from Congress earlier than the candidate needs
12 to obtain that waiver.

13 CHIEF JUSTICE ROBERTS: Well, even though
14 it's pretty unlikely or at least would be difficult
15 for an individual who says, you know, I -- I am an
16 insurrectionist and I had taken the oath, that would
17 require two-thirds of votes in Congress, right?

18 MR. MITCHELL: Correct.

19 CHIEF JUSTICE ROBERTS: Well, that's a
20 pretty unlikely scenario.

21 MR. MITCHELL: It may be unlikely, but no
22 secretary of state is permitted to predict the
23 likelihood of a waiver because, in doing so, they're
24 adding a new qualification to the ability to run for
25 Congress.

1 And the proper analogy, Mr. Chief Justice,
2 is to state residency laws because the Constitution
3 says that a member of Congress must inhabit the state
4 that he represents when elected. And the lower
5 courts have all held, in reliance on Term Limits,
6 that a state election official cannot move that
7 deadline any earlier by requiring the candidate for
8 Congress to inhabit the state --

9 CHIEF JUSTICE ROBERTS: So even if somebody
10 --

11 MR. MITCHELL: -- before the date of
12 election.

13 CHIEF JUSTICE ROBERTS: -- comes in and
14 says I'm -- I'm a resident of -- to the secretary of
15 state's office in Illinois and says, I'm a resident
16 of Indiana, I have been all my life, I want to run
17 for office in Illinois, the secretary of state can't
18 say, no, you can't?

19 MR. MITCHELL: Well, the question would be
20 is that person going to inhabit the state when the
21 election is held. So, if the candidate makes clear,
22 perhaps through a sworn declaration or through his
23 own statements, that he has no intention of
24 relocating to that state before Election Day, then
25 the secretary of state would be enforcing an extant

1 constitutional qualification rather than enforcing a
2 new state-imposed qualification.

3 And that's the key under Term Limits. Is
4 the state in any way altering the criteria for a
5 federal office, either for Congress or for the
6 presidency? And in this situation, the Colorado
7 Supreme Court is going slightly beyond what Section 3
8 requires because Section 3 on its face bans an
9 insurrectionist only from holding office.

10 JUSTICE SOTOMAYOR: Counsel, can I stop you
11 a moment and -- and back up a minute? You admitted
12 that the concept of self-executing does generally
13 permit states to provide a cause of action for
14 breaches of a constitutional provision.

15 MR. MITCHELL: Correct.

16 JUSTICE SOTOMAYOR: In fact, they do it
17 frequently for takings clauses. Here, there's no
18 debate that Colorado has placed that -- provided that
19 cause of action. You want to go a step further and
20 say that this, like the Treaty Clause, requires
21 implementing legislation to permit the state to
22 disqualify an insurrectionist --

23 MR. MITCHELL: That's correct. So --

24 JUSTICE SOTOMAYOR: -- under Section 3.

25 MR. MITCHELL: That's right.

1 JUSTICE SOTOMAYOR: So history proves a lot
2 to me --

3 MR. MITCHELL: Mm-hmm.

4 JUSTICE SOTOMAYOR: -- and to my colleagues
5 generally. There's a whole lot of examples of states
6 relying on Section 3 to disqualify insurrectionists
7 for state offices, and you're basically telling us
8 that you want us to go two steps further.

9 You want to -- maybe three. You want us to
10 say that self-execution doesn't mean what it
11 generally means. You want us now to say it means
12 that Congress must permit states or require states to
13 stop insurrectionists from taking state office. And
14 -- and so this is a complete preemption in a way
15 that's very rare, isn't it?

16 MR. MITCHELL: Well, the only thing I would
17 --

18 JUSTICE SOTOMAYOR: It's rare under the
19 Fourteenth Amendment.

20 MR. MITCHELL: Oh, of course, it's rare.
21 This is -- this is a one-off situation. And, Your
22 Honor, the only thing I'm --

23 JUSTICE SOTOMAYOR: Well, it is one-off. I
24 don't disagree with you. But it's not with -- with
25 respect to how we define self-executing.

1 MR. MITCHELL: We're not asking this Court
2 to redefine the concept of non-self-execution. We
3 were careful in our brief not to rely on that phrase.
4 And Griffin's Case doesn't --

5 JUSTICE SOTOMAYOR: Right, you are, because
6 it's not.

7 MR. MITCHELL: That's right.

8 JUSTICE SOTOMAYOR: All right.

9 MR. MITCHELL: And Griffin's Case --

10 JUSTICE SOTOMAYOR: So now the question is
11 a very different one --

12 MR. MITCHELL: Mm-hmm.

13 JUSTICE SOTOMAYOR: -- in my mind. I
14 understand you're relying on Griffin. Let's just be
15 very clear.

16 MR. MITCHELL: Right.

17 JUSTICE SOTOMAYOR: Griffin was not a
18 precedential Supreme Court decision.

19 MR. MITCHELL: That's correct.

20 JUSTICE SOTOMAYOR: All right. It was a
21 circuit court decision by a justice who, when he
22 becomes a justice, writes in the Davis case, he
23 assumed that Jefferson Davis would be ineligible to
24 hold any office, particularly the presidency, and
25 treated -- and this is his words --

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE SOTOMAYOR: -- Section 3 as
3 executing itself, needing no legislation on the part
4 of Congress to give it effect.

5 So you're relying on a non-precedential
6 case by a justice who later takes back what he said.

7 MR. MITCHELL: But the key point with
8 Griffin's Case and why it's an important precedent,
9 despite everything Your Honor said, it is not a
10 precedent of this Court, but Griffin's Case provided
11 the backdrop against which Congress legislated the
12 Enforcement Act of 1870 when it first provided an
13 enforcement mechanism for Section 3.

14 JUSTICE SOTOMAYOR: Then did away with it
15 later.

16 MR. MITCHELL: It did away with it later.
17 But, as --

18 JUSTICE SOTOMAYOR: But -- but that has
19 nothing to say with respect to what Section 3 means.

20 Can we get to the issue, which is, I think,
21 one that I go back to that I started with, and -- and
22 very briefly, what sense does it say that states
23 can't enforce Section 3 against their own officials?

24 MR. MITCHELL: Be --

25 JUSTICE SOTOMAYOR: And I think, logically,

1 those are two separate issues in my mind: Can states
2 enforce the Insurrection Clause against their own
3 office holders, or can they enforce it against
4 federal officials, or can they enforce it against the
5 president? Those are all three different questions
6 in my mind.

7 MR. MITCHELL: And the -- the answer to all
8 three of those questions turns on whether this Court
9 agrees with the holding of Griffin's Case. If
10 Griffin's Case is the proper enunciation of the law,
11 then a state cannot do any of the things Your Honor
12 suggested unless Congress gives it authority to do so
13 through implementing legislation.

14 JUSTICE SOTOMAYOR: So a non-precedential
15 decision that relies on policy doesn't look at the
16 language, doesn't look at the history, doesn't
17 analyze anything than the disruption that such a suit
18 would bring, you want us to credit as precedential?

19 MR. MITCHELL: Because Congress relied on
20 Griffin's Case when it enacted the Enforcement Act of
21 1870 and established the --

22 JUSTICE KAGAN: So, Mr. Mitchell, if I may
23 interrupt just to clarify, I mean, this sounds like
24 your reply brief, where it sounds like you're not
25 making a constitutional argument, you're really

1 making a statutory preemption argument. And --

2 MR. MITCHELL: Right.

3 JUSTICE KAGAN: -- is that -- is that what
4 you're doing here? You're not saying that the
5 Constitution gives you this rule. It's the kind of
6 combination of Griffin's Case plus the way Congress
7 acted after Griffin's Case --

8 MR. MITCHELL: Yes.

9 JUSTICE KAGAN: -- that gives you the rule?

10 MR. MITCHELL: That's exactly right,
11 Justice Kagan, because we have implementing
12 legislation, Congress took up the invitation provided
13 by Griffin's Case and established writs of quo
14 warranto in the 1870 Enforcement Act, later repealed
15 them.

16 The only enforcement legislation that's
17 currently on the books is the insurrection criminal
18 statute, Section 2383. And when Congress made all of
19 these decisions, the initial enactment of the
20 Enforcement Act in 1870, the repeal of the quo
21 warranto provisions in 1948, all of those were made
22 with Griffin's Case as the backdrop. The under --

23 JUSTICE KAGAN: I -- please.

24 MR. MITCHELL: Well, the understanding was
25 that these congressionally established remedies would

1 be exclusive of state court remedies. So there's not
2 an express statement of preemption in these statutes,
3 but there didn't need to be because Griffin's Case
4 provided the backdrop.

5 JUSTICE KAGAN: And if I could just
6 understand the argument a little bit better, suppose
7 that we took all of that way away. You know, suppose
8 there were no Griffin's Case and there were no
9 subsequent congressional enactment. What do you then
10 think the rule would be?

11 MR. MITCHELL: So in just as a matter of
12 first principles without Griffin's Case, it's a much
13 harder argument for us to make because, normally, I
14 mean, every other provision of the Fourteenth
15 Amendment has been treated as self-executing.

16 What we would argue in the hypothetical
17 that Your Honor has suggested is that there are
18 practical considerations unique to Section 3 that
19 counsel in favor of a rule similar to what Chief
20 Justice Chase spelled out in Griffin's Case and it
21 goes to I think the policy concerns he talks about,
22 where this was a case -- Griffin's Case involved a
23 convicted criminal who was seeking a writ of habeas
24 corpus on the ground that the judge who tried his
25 case was an insurrectionist disqualified under

1 Section 3, and Chief Justice Chase realizes that if
2 he enforces Section 3 in this situation, it would
3 nullify every official act taken not only by this
4 particular judge but by anyone who is an
5 insurrectionist or arguably an insurrectionist under
6 Section 3, and that was --

7 JUSTICE BARRETT: Well, why do you need
8 those consequential concerns, though? I mean, it
9 kind of seems to me that what Justice Kagan is
10 getting at is why don't you have an argument that the
11 Constitution of its own force, that Section 3 of its
12 own force, preempts the state's ability not -- not
13 necessarily, I think, not, to enforce Section 3
14 against its own officers but against federal
15 officers, like in a Tarble's Case kind of way.

16 MR. MITCHELL: So there could also be an
17 argument that's more limited. You're suggesting
18 there may be a barrier under the Constitution to a
19 state legislating an enforcement mechanism for
20 Section 3 specific to federal officers.

21 We could rely on precedents such as McClung
22 that says that state courts lack the authority to
23 issue mandamus relief against federal officials and
24 extend that principle here.

25 JUSTICE BARRETT: Well, why aren't you

1 making those arguments?

2 MR. MITCHELL: Because that doesn't get us
3 -- that -- Griffin's Case --

4 JUSTICE BARRETT: That only gets you out of
5 state court, it doesn't get you out of federal court?

6 MR. MITCHELL: Right. And also the holding
7 of Griffin's Case went well beyond that because Chief
8 Justice Chase said in this opinion, which again
9 provided the backdrop for the congressional
10 enforcement legislation, that states had no role in
11 enforcing Section 3 unless Congress was to give them
12 that authority through a statute that they passed
13 pursuant to their legislative powers.

14 JUSTICE GORSUCH: I --

15 JUSTICE BARRETT: But your argument's --

16 JUSTICE GORSUCH: Please go ahead.

17 JUSTICE BARRETT: I was just going to add
18 one last thing. I think your argument's a little
19 broader than that because I think, if we accept your
20 position that disqualifying someone from the ballot
21 is adding a qualification, really, your position is
22 that Congress can't enact a statute that would allow
23 Colorado to do what it's done either because then
24 Congress would be adding a qualification, which it
25 can't do either.

1 MR. MITCHELL: No, I don't agree with that,
2 Justice Barrett. Congress is not bound by the
3 holding of Term Limits. Term Limits only prohibits
4 the states from adding additional qualifications or
5 altering the Constitution's qualifications for
6 federal office. It does not purport to restrain
7 Congress.

8 So, if Congress were to enact implementing
9 legislation that authorized the states to exclude
10 insurrectionists from the ballot, we believe that
11 would be valid enforcement legislation under Section
12 3 with an important caveat. There has to be
13 congruence and proportionality under this Court's
14 precedents.

15 JUSTICE ALITO: Well, why would that be an
16 important -- why would that be permissible? Because
17 Section 3 refers to the holding of office, not
18 running for office.

19 And so, if a state or Congress were to go
20 further and say that you can't run for the office,
21 you can't compete in a primary, wouldn't that be
22 adding an additional qualification for serving for
23 president? You must have been free from this
24 disqualification at an earlier point in time than
25 Section 3 specifies.

1 MR. MITCHELL: I think the answer to your
2 question, Justice Alito, depends on how you interpret
3 the word "enforce" in Section 5. And some members of
4 this Court, such as Justice Scalia, thought that
5 "enforce" means you can do nothing more than enact
6 legislation that mirrors the Fourteenth Amendment's
7 self-executing requirements and you can't go an inch
8 beyond that. That's not the current jurisprudence of
9 this Court --

10 JUSTICE ALITO: No. Well, all right. You
11 have --

12 MR. MITCHELL: -- that allow --

13 JUSTICE ALITO: -- to decide whether it's
14 congruent and proportional.

15 MR. MITCHELL: Right.

16 JUSTICE ALITO: And we would get into the
17 question of whether that would be congruent and
18 proportional.

19 Well, let me shift gear a little bit. I --
20 I take you to -- to argue, and I think this is right,
21 that the term "self-executing" is a misnomer as
22 applied here.

23 MR. MITCHELL: Yes, it is.

24 JUSTICE ALITO: Very often, when we use the
25 term, what we're referring to is the proposition that

1 a particular provision of the Constitution or a
2 statute in and of itself creates a private right of
3 action. That's not what the issue is here.

4 MR. MITCHELL: No, that's not the issue
5 here. And sometimes the phrase "self-executing" is
6 used that way. The only thing I would add is
7 sometimes it's used in a different sense. With
8 self-executing treaties or non-self-executing
9 treaties, the issue is whether that treaty has any
10 force as domestic law whatsoever.

11 JUSTICE ALITO: Right. Right. Well, I
12 don't see what is gained by using this term which is
13 used in different contexts rather than directly
14 addressing what's involved here, which is the
15 question of who can enforce Section 3 with respect to
16 a presidential candidate.

17 MR. MITCHELL: Mm-hmm.

18 JUSTICE ALITO: The consequences of what
19 the Colorado Supreme Court did, some people claim,
20 would be quite severe. Would it not permit -- would
21 it not lead to the possibility that other states
22 would say, using their choice-of-law rules and their
23 rules on -- on collateral estoppel, that there's
24 non-mutual collateral estoppel against former
25 President Trump and so the decision of the Colorado

1 Supreme Court could effectively decide this question
2 for many other states, perhaps all other states?
3 Could it not lead to that consequence?

4 MR. MITCHELL: I don't think so because
5 Colorado law does not recognize non-mutual collateral
6 estoppel. And I believe the preclusive effect of the
7 decision would be determined by Colorado law rather
8 than the law of another state.

9 But I think your question, Justice Alito,
10 gives rise to an even greater concern because, if
11 this decision does not have preclusive effect in
12 other lawsuits, it opens the possibility that a
13 different factual record could be developed in some
14 of the litigation that occurs in other states, and
15 different factual findings could be entered by state
16 trial court judges. They might conclude as a matter
17 of fact that President Trump did not have any intent
18 to engage in incitement or make some other finding
19 that differs from what this trial court judge found.

20 JUSTICE ALITO: Yeah, exactly. So this --
21 in this decision, the -- the trial court in Colorado
22 thought that it was proper to admit the January 6th
23 report, and it also admitted the testimony of an
24 expert --

25 MR. MITCHELL: Mm-hmm.

1 JUSTICE ALITO: -- who testified about the
2 meaning of certain words and phrases to people who
3 communicate with and among extremists, right?

4 MR. MITCHELL: Yes.

5 JUSTICE ALITO: Another -- another state
6 court could reach an opposite conclusion on both of
7 those questions.

8 MR. MITCHELL: Certainly. Other states
9 could conclude that the January 6th report is
10 inadmissible hearsay. They might also conclude that
11 statements within the January 6th report were hearsay
12 even if the report itself is not. And they could
13 certainly reach a different conclusion with respect
14 to the expert testimony of Professor Simi. Perhaps
15 in another state, we would have time to produce our
16 own sociology expert who would contradict Professor
17 Simi.

18 JUSTICE ALITO: Now should -- should these
19 considerations be dismissed as simply
20 consequentialist arguments, or do they support a
21 structural argument that supports the position that
22 you're taking here?

23 MR. MITCHELL: I think they all mutually
24 reinforce each other. We have an argument, we
25 believe, that is sufficient to dispose of this case

1 just based on the meaning of "officer of the United
2 States," as well as the argument we're making based
3 on Term Limits, but all of the consequentialist
4 considerations that Your Honor has suggested are
5 additional reasons to reverse the Colorado Supreme
6 Court, although we don't think it's necessary to get
7 into consequences because the law is clearly on our
8 side.

9 JUSTICE SOTOMAYOR: Can I -- you keep
10 saying Term Limits. There are other presidential
11 qualifications in the Constitution, age.

12 MR. MITCHELL: Yes.

13 JUSTICE SOTOMAYOR: Citizenship. There's a
14 separate amendment, the Twenty-Second Amendment, that
15 doesn't permit anyone to run for a second term.

16 We have a history of states disqualifying
17 -- not all, but some -- of disqualifying candidates
18 who won't be of age if elected. We have a history of
19 at least one state disqualifying someone who wasn't a
20 U.S. citizen.

21 MR. MITCHELL: Right.

22 JUSTICE SOTOMAYOR: Is -- are your
23 arguments limited to Section 3?

24 MR. MITCHELL: Not quite. The question,
25 Justice Sotomayor, is whether the state is violating

1 Term Limits by adding to or altering the extant
2 qualifications for the presidency in the
3 Constitution. Now the hypo --

4 JUSTICE SOTOMAYOR: So you want us to say
5 -- I'm wondering why the Term Limits qualification is
6 important to you.

7 MR. MITCHELL: Because it --

8 JUSTICE SOTOMAYOR: Are you setting up so
9 that if some president runs for a third term, that a
10 state can't disqualify him from the ballot?

11 MR. MITCHELL: Of course, a state can
12 disqualify him from the ballot because that is a
13 qualification that is categorical. It's not
14 defeasible by Congress. So a state is enforcing the
15 Constitution when it says you can't appear on our
16 ballot if you've already served two terms as
17 president.

18 The same goes --

19 JUSTICE SOTOMAYOR: The same if they're
20 under age when elected and the same if they're not a
21 U.S. citizen.

22 MR. MITCHELL: The same if they're not --
23 well, the same if they're not a U.S. citizen for
24 sure. The age is a little more nuanced because you
25 can imagine a scenario where the person is 34 years

1 old at the time of the election, but he turns 35
2 before Inauguration Day.

3 JUSTICE SOTOMAYOR: Well, then that would
4 come up --

5 MR. MITCHELL: A state could not --

6 JUSTICE SOTOMAYOR: -- that would probably
7 come up to us at some point. The state would make a
8 decision and say he's ineligible, and we would have
9 to decide that question then.

10 But my point is so what -- adding
11 qualifications to what term limit --

12 MR. MITCHELL: You're --

13 JUSTICE SOTOMAYOR: -- is your argument
14 based on?

15 MR. MITCHELL: You're changing --

16 JUSTICE SOTOMAYOR: I'm just confused.

17 MR. MITCHELL: Okay. With respect to the
18 -- maybe I'll start with the age example.

19 JUSTICE SOTOMAYOR: Mm-hmm.

20 MR. MITCHELL: If a state like Colorado
21 says you can't appear on our presidential ballot
22 unless you are 35 years old on the day of the
23 election, that would be a violation of Term Limits
24 because there could be a 34-year-old on the day of
25 the election who turns 35 before Inauguration Day.

1 What Colorado has done here, what their
2 supreme court has done, is similar because, under
3 Section 3, President Trump needs to qualify during
4 the time that he would hold office, and the Colorado
5 Supreme Court is saying to President Trump: You have
6 to show that you would qualify under Section 3 now,
7 at the time of the election, or at the time that we,
8 the state supreme court --

9 JUSTICE SOTOMAYOR: Now I understand.

10 JUSTICE KAGAN: So what -- what --

11 CHIEF JUSTICE ROBERTS: Now just -- just a
12 point of clarification so we're all on the same page.
13 When you say "Term Limits," you mean our decision in
14 the Term Limits case --

15 MR. MITCHELL: Yes. I'm sorry.

16 CHIEF JUSTICE ROBERTS: -- not the
17 constitutional provision governing term limits?

18 MR. MITCHELL: Yes. U.S. Term Limits
19 against Thornton. Maybe I should call it Thornton
20 instead of Term Limits.

21 CHIEF JUSTICE ROBERTS: That would be
22 easier.

23 MR. MITCHELL: I'm sorry.

24 JUSTICE JACKSON: And does it have some --

25 JUSTICE SOTOMAYOR: I -- I was confused.

1 JUSTICE JACKSON: So does it have something
2 to do with the fact that the particular circumstance
3 that you're talking about can change? Is that what
4 you mean? I'm trying to understand --

5 MR. MITCHELL: Yeah.

6 JUSTICE JACKSON: -- the distinction
7 between the provision in the Constitution that
8 relates to disqualification on the basis of
9 insurrection behavior --

10 MR. MITCHELL: Mm-hmm.

11 JUSTICE JACKSON: -- and these other
12 provisions that Justice Sotomayor points out. They
13 all seem to me to be extant constitutional
14 requirements. So you -- but you're drawing a
15 distinction.

16 MR. MITCHELL: Right. I'm drawing a
17 distinction because some of them are categorical,
18 such as --

19 JUSTICE JACKSON: What do you mean by
20 "categorical"? Whether or not you are an
21 insurrectionist is or is not categorical?

22 MR. MITCHELL: It is not categorical
23 because Congress --

24 JUSTICE JACKSON: Because?

25 MR. MITCHELL: -- because Congress can lift

1 the disability by a two-thirds vote. And there is --

2 JUSTICE JACKSON: But -- but why does --
3 why does that change the initial determination of
4 whether or not you fall into the category? I don't
5 understand the fact that you can be excused from
6 having been in the category -- why does that not make
7 it a categorical determination?

8 MR. MITCHELL: Because we don't know
9 whether President Trump will be excused before he's
10 sworn in, if he wins the election, on January 20th,
11 2025. And a -- and a court that is saying that
12 President Trump has to show now, today, that he would
13 qualify under Section 3 is accelerating the deadline
14 that the Constitution provides for him to obtain a
15 waiver from Congress.

16 JUSTICE JACKSON: But that's by virtue of
17 the "hold," right, "hold office." This is --

18 MR. MITCHELL: Correct. Yes.

19 JUSTICE JACKSON: Okay.

20 MR. MITCHELL: Section 3 bans him only from
21 holding office. It does not --

22 JUSTICE JACKSON: All right. Can I ask you
23 -- I'm just -- now that I have the floor --

24 MR. MITCHELL: Yes.

25 JUSTICE JACKSON: -- can I ask you to

1 address your first argument, which is the
2 office/officer point?

3 JUSTICE KAGAN: Could -- could --
4 JUSTICE JACKSON: Oh, sorry.
5 CHIEF JUSTICE ROBERTS: Yeah, why don't we
6 --

7 JUSTICE KAGAN: -- could we --
8 JUSTICE JACKSON: Oh.
9 JUSTICE KAGAN: Is that okay if we do this
10 and then we go to that?

11 JUSTICE JACKSON: Sure. Sure, sure, sure.
12 JUSTICE KAGAN: You know, but --
13 JUSTICE JACKSON: Go ahead.
14 JUSTICE KAGAN: Will there be an
15 opportunity to do "officer" stuff, or should we --

16 CHIEF JUSTICE ROBERTS: Absolutely.
17 Absolutely.

18 (Laughter.)

19 JUSTICE KAGAN: I just want to understand.
20 So, on -- on -- on this theory, what is the sum total
21 of ways that the -- that Section 3 can be enforced,
22 that -- that -- that -- that -- that some --

23 MR. MITCHELL: Yeah.
24 JUSTICE KAGAN: -- that somebody out there
25 can say, yes, there has been a former president who

1 engaged or led or participated in an insurrection and
2 so should be disqualified from office, putting aside
3 the officer argument --

4 MR. MITCHELL: Right.

5 JUSTICE KAGAN: -- what is the sum total of
6 ways that that enforcement can happen?

7 MR. MITCHELL: So the answer to that
8 question is going to depend on what Your Honor thinks
9 of Griffin's Case. So, if this Court were to affirm
10 the rationale of Griffin's Case, then the only way
11 Section 3 could be enforced is through congressional
12 legislation that creates a remedy. So Congress could
13 reinstate the quo warranto provisions that they
14 initially had in the 1870 --

15 JUSTICE KAGAN: Is that your position?

16 MR. MITCHELL: Yes, because we believe
17 Griffin's Case is correctly decided and should be
18 followed --

19 JUSTICE KAGAN: And how does that fit with
20 -- a lot of the -- the -- the answers to the
21 questions that we've been giving, you said, well,
22 Congress has to have the ability by a two-thirds vote
23 to lift the disqualification.

24 MR. MITCHELL: Right.

25 JUSTICE KAGAN: But so too I -- I would

1 think that that provision would -- would -- would be
2 in some tension with what you just said --

3 MR. MITCHELL: There is some, yeah.

4 JUSTICE KAGAN: -- because, if Congress has
5 the ability to lift the vote by a two-thirds
6 majority, then surely it can't be right that one
7 House of Congress can do the exact same thing by a
8 simple majority.

9 MR. MITCHELL: Yeah, there certainly is
10 some tension, Justice Kagan, and some commentators
11 have pointed this out. Professor Baude and Professor
12 Paulson criticized Griffin's Case very sharply.

13 JUSTICE KAGAN: Then I must be right.

14 (Laughter.)

15 MR. MITCHELL: Well, we don't think it's --
16 we don't think this problem is fatal because, to us,
17 the two-thirds provision that allows Congress to lift
18 a disability is something akin to a pardon power,
19 where Congress, through enforcement legislation,
20 creates a mechanism by which the insurrectionist
21 issue is to be determined by some entity, it could be
22 the legislature in the case of an elected member of
23 Congress, each House has the ability to judge the
24 qualifications of their members, or if it's outside
25 the situation of Congress, it would be whatever

1 Congress enacts.

2 So, when it was the writs of quo warranto,
3 each federal prosecutor had the authority to bring a
4 quo warranto writ against an incumbent official and
5 seek his ouster from office under Section 3, but it
6 was still subject to that amnesty provision in
7 Section 3 of the Fourteenth Amendment.

8 So we do acknowledge the tension, but we
9 don't think that's an insurmountable obstacle in the
10 case.

11 JUSTICE ALITO: I don't even see why
12 there's -- why there's a tension. If you analogize
13 the -- the lifting by Congress of the
14 disqualification by a two-thirds vote to a pardon,
15 then, surely, one would not argue that the fact that
16 the president or a governor can pardon someone from a
17 criminal conviction or a criminal offense means that
18 the person couldn't be prosecuted in the first place
19 for the criminal offense.

20 MR. MITCHELL: That's right.

21 JUSTICE ALITO: Right?

22 MR. MITCHELL: Yes.

23 JUSTICE ALITO: So I don't see what the
24 tension is. They're two separate things. Did the
25 person engage in this activity which is prohibited,

1 and second, even if the person did engage in the
2 activity, are there reasons why the disqualification
3 or the -- should be lifted or the pardon should be
4 granted.

5 MR. MITCHELL: That's right. I mean, if --
6 again, if the Court accepts the holding of Griffin's
7 Case, that's exactly the regime that we would have,
8 like the Court described.

9 JUSTICE ALITO: Yeah. I don't see there's
10 a tension.

11 JUSTICE KAGAN: But I guess I don't --

12 JUSTICE ALITO: But, also, there's a limit
13 on what one can infer from the mere fact that
14 Congress can lift the disqualification. You can't
15 infer from that that it is impermissible to have a
16 prior determination that the person did engage in the
17 insurrection. You can't make that inference.

18 MR. MITCHELL: Okay.

19 JUSTICE ALITO: It's not logical.

20 JUSTICE KAGAN: Well, but I think --

21 JUSTICE JACKSON: Yet isn't that what
22 you're doing?

23 JUSTICE KAGAN: -- what's -- what's --
24 what's -- what's -- what's in tension is that you
25 would have the exact same actor and say, look, that

1 actor can lift --

2 MR. MITCHELL: Right.

3 JUSTICE KAGAN: -- the disqualification by
4 a two-thirds vote.

5 But you're saying only that actor can put
6 the disqualification into effect in the first place
7 and it can do that by far less than two-thirds. It
8 can do that just by a simple majority of one House.

9 MR. MITCHELL: Or -- or it could do that by
10 doing nothing at all if -- if the holding of
11 Griffin's Case is correct because just --

12 JUSTICE KAGAN: Yes, exactly.

13 MR. MITCHELL: -- congressional inaction
14 would --

15 JUSTICE KAGAN: But that means that there
16 will --

17 MR. MITCHELL: -- effectively act as a --

18 JUSTICE KAGAN: The only thing it takes --

19 MR. MITCHELL: Yeah.

20 JUSTICE KAGAN: -- to have no action --

21 MR. MITCHELL: Right.

22 JUSTICE KAGAN: -- is -- you know, is, you
23 know, half plus one saying we don't feel like it.

24 MR. MITCHELL: But that's why we tried to
25 characterize our Griffin's Case argument the way we

1 did where we rely on preemption doctrines as well.

2 So we have --

3 JUSTICE KAVANAUGH: Well, don't -- don't
4 you think --

5 CHIEF JUSTICE ROBERTS: Why don't we --

6 JUSTICE KAVANAUGH: -- Griffin's Case is
7 also relevant to trying to figure out what the
8 original public meaning of Section 3 of the
9 Fourteenth Amendment is? It's by the Chief Justice
10 of the United States a year after the Fourteenth
11 Amendment. That seems to me --

12 MR. MITCHELL: Yes.

13 JUSTICE KAVANAUGH: -- highly probative of
14 what the meaning or understanding of that language,
15 otherwise elusive language, is.

16 MR. MITCHELL: I do think it's probative,
17 Justice Kavanaugh. We didn't rely too heavily on the
18 point that you're making, partly because we have this
19 other opinion from Justice Chase in the Jefferson
20 Davis case. So that argument could potentially
21 boomerang on us, which is why we didn't push it very
22 hard in our briefing.

23 CHIEF JUSTICE ROBERTS: Thank you.

24 MR. MITCHELL: But I think Your Honor is
25 right. This is --

1 CHIEF JUSTICE ROBERTS: Why don't you
2 finish your sentence and then we'll move on.

3 MR. MITCHELL: Just it is -- it is relevant
4 and probative for sure, but I think there is other
5 evidence too that might perhaps undercut the
6 usefulness of trying to characterize Griffin's Case
7 as completely emblematic of the original
8 understanding.

9 CHIEF JUSTICE ROBERTS: Then why don't we
10 move on to the officer point.

11 MR. MITCHELL: Certainly.

12 CHIEF JUSTICE ROBERTS: And, Justice
13 Jackson, I think you --

14 JUSTICE JACKSON: Yes. So I had a question
15 about it because you're making a textualist argument.

16 MR. MITCHELL: Mm-hmm.

17 JUSTICE JACKSON: And as I look at Section
18 3, I see two parts of the first sentence of Section
19 3.

20 MR. MITCHELL: Mm-hmm.

21 JUSTICE JACKSON: The first is a list of
22 offices that a disqualified person is barred from
23 holding, and the second are specific circumstances
24 that give rise to disqualification.

25 So, first, am I right about seeing that

1 there are two different things happening in the first
2 sentence?

3 MR. MITCHELL: Yes, for sure.

4 JUSTICE JACKSON: Okay. So are you arguing
5 both in this case or just one? Are you arguing both
6 that the office of the presidency should not be
7 considered one of the barred offices --

8 MR. MITCHELL: Mm-hmm.

9 JUSTICE JACKSON: -- and that the person --
10 a person who previously took the presidential oath is
11 not subject to disqualification?

12 MR. MITCHELL: We are arguing both, Your
13 Honor.

14 JUSTICE JACKSON: I don't see that in your
15 brief.

16 MR. MITCHELL: Well --

17 JUSTICE JACKSON: I see a lot of focus on
18 the second but not on the first.

19 MR. MITCHELL: -- there is definitely more
20 focus on the second, and we acknowledge that we have
21 a somewhat heavier lift on the first point just
22 because --

23 JUSTICE JACKSON: Why? It seems to me that
24 you have a list and president is not on it.

25 MR. MITCHELL: That -- that's certainly an

1 argument in our favor, but there are also -- with
2 respect to "officer of the United States," that's
3 used repeatedly in the Constitution and the
4 Commissions Clause and the Appointments Clause and
5 also in the Impeachment Clause, and every time it
6 appears, it's used in a way that clearly excludes the
7 president.

8 JUSTICE JACKSON: No, I understand.

9 MR. MITCHELL: So we don't --

10 JUSTICE JACKSON: But that's the second
11 argument.

12 MR. MITCHELL: That is. And the --

13 JUSTICE JACKSON: So the first argument --

14 MR. MITCHELL: Mm-hmm.

15 JUSTICE JACKSON: -- is we have a list of
16 offices --

17 MR. MITCHELL: Yes.

18 JUSTICE JACKSON: -- that a person is
19 barred from holding, right --

20 MR. MITCHELL: Yes.

21 JUSTICE JACKSON: -- under your theory or
22 under the -- the language of --

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE JACKSON: -- and we see it begins
25 with senator, representative, elector --

1 MR. MITCHELL: Elector.

2 JUSTICE JACKSON: -- of the president and
3 vice president, and all other civil or military
4 officers -- offices.

5 MR. MITCHELL: Offices under the United
6 States --

7 JUSTICE JACKSON: Offices under the United
8 States.

9 MR. MITCHELL: -- is how it's phrased.

10 JUSTICE JACKSON: But the word "president
11 or vice president" does not in it appear -- not
12 appear specifically --

13 MR. MITCHELL: That's right.

14 JUSTICE JACKSON: -- in that list. So I
15 guess I'm trying to understand, are you giving up
16 that argument?

17 MR. MITCHELL: No.

18 JUSTICE JACKSON: And, if so, why?

19 MR. MITCHELL: No, we're not giving it up
20 at all. You're right, the president and the vice
21 president are not specifically listed, but the
22 Anderson litigants claim that they are encompassed
23 within the meaning of the phrase "office under the
24 United States." And that --

25 JUSTICE JACKSON: And do you agree that --

1 that the Framers would have put such a high and
2 significant and important office, sort of smuggled it
3 in through that catch-all phrase?

4 MR. MITCHELL: No, we don't agree at all.
5 That's why we're still making the argument that the
6 presidency is excluded from the covered offices that
7 are listed at the beginning of Section 3.

8 JUSTICE SOTOMAYOR: I -- I'm sorry, your
9 brief says you didn't take a position on that point.

10 MR. MITCHELL: I'm sorry.

11 JUSTICE SOTOMAYOR: And your brief said --
12 I don't have the -- the cite, I -- I apologize --

13 MR. MITCHELL: Okay.

14 JUSTICE SOTOMAYOR: -- you don't
15 affirmatively argue that point I think is what your
16 brief said.

17 MR. MITCHELL: In the blue brief?

18 JUSTICE SOTOMAYOR: Yes.

19 MR. MITCHELL: Well, we certainly argued it
20 in the reply brief and I'll have to look at what we
21 -- how we phrased it. But we did point out in our
22 opening brief that there are potential issues if this
23 Court were to rule on "office under" because that
24 phrase appears in other parts of the Constitution,
25 including the Emoluments Clause, the Impeachment

1 Disqualification Clause, and it would --

2 JUSTICE JACKSON: Would we necessarily have
3 to say -- I mean, I thought -- I thought the point
4 was that Section 3 was unique, that there was
5 something happening with Section 3 that could explain
6 why certain offices were left off or whatnot.

7 MR. MITCHELL: Perhaps, but there are also
8 implications from other parts of the Constitution
9 which really help us on the "officer of the United
10 States" argument in that second part of Section 3 but
11 somewhat cut against us when it comes to "office
12 under the United States."

13 And the Anderson litigants point this out
14 in Footnote 9 in the red brief where they say, if
15 this Court were to say the presidency is an excluded
16 office under the United States, that could imply, for
17 example, the president is not covered by the
18 Emoluments --

19 JUSTICE GORSUCH: Mr. -- Mr. Mitchell --

20 MR. MITCHELL: Yes.

21 JUSTICE GORSUCH: -- stepping back on this
22 --

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE GORSUCH: -- a -- a lot hinges on
25 the difference between -- in your argument between

1 the term "office" and "officer."

2 MR. MITCHELL: Yes.

3 JUSTICE GORSUCH: And I -- I -- I guess I'm
4 wondering what theory do you have from an original
5 understanding or a textualist perspective --

6 MR. MITCHELL: Mm-hmm.

7 JUSTICE GORSUCH: -- why those two terms so
8 closely related would carry such different weight?

9 MR. MITCHELL: Because it's clear from the
10 constitutional text that there are officers that do
11 not hold offices under the United States, for
12 example, the Speaker of the House and the president
13 pro tempore. They're described as officers in
14 Article I who are chosen by the legislature.

15 They also have to be officers if they're
16 able to be covered by the Presidential Succession Act
17 because, under the Constitution, only officers can
18 serve when there's a vacancy in both the presidency
19 and the vice presidency.

20 So they're officers, but they're not
21 offices under the United States because of the
22 Incompatibility Clause, which says that if you're a
23 member of Congress, you cannot simultaneously hold an
24 office under the United States. So that provision of
25 the Constitution clearly demonstrates that --

1 JUSTICE GORSUCH: I -- I --

2 MR. MITCHELL: -- members of Congress can't
3 hold offices.

4 JUSTICE GORSUCH: -- I -- I appreciate that
5 response. Is -- is there anything in the original
6 drafting, history, discussion that you think
7 illuminates why that distinction would carry such
8 profound weight?

9 MR. MITCHELL: Not -- not of which we're
10 aware. So these are textual inferences that we're
11 drawing --

12 JUSTICE GORSUCH: Yeah.

13 MR. MITCHELL: -- from constitutional
14 structure, intratextualist analysis.

15 JUSTICE GORSUCH: Yeah.

16 MR. MITCHELL: But we aren't relying
17 necessarily on the thought processes of the people
18 who drafted these provisions because they're
19 unknowable. But, even if they were knowable, we're
20 not sure they would be relevant in any event because
21 this language, especially in Section 3, was enacted
22 as a compromise.

23 There were certainly radical Republicans
24 who wanted to go much further if you look at some of
25 the earlier drafts that were proposed. Some people

1 wanted to ban all insurrectionists from holding
2 office regardless of whether they previously swore an
3 oath. Some people wanted to go further and ban them
4 even from voting.

5 CHIEF JUSTICE ROBERTS: Thank you. Thank
6 you, counsel.

7 I just have one very technical question.
8 The statute in 1870, if it were still in effect,
9 would require you to modify your arguments slightly.
10 It was repealed, as you say, in 1948.

11 I tried to find it, but I couldn't. Do you
12 know why it was repealed?

13 MR. MITCHELL: No, we don't know why. It
14 looks like it was done as part of a reorganization of
15 the U.S. Code, so it doesn't appear there was any
16 policy motivation behind that decision. I think a
17 lot of things got repealed during the 1948 decisions
18 that were made.

19 CHIEF JUSTICE ROBERTS: Okay.

20 Justice Thomas, anything further?

21 Justice Alito?

22 JUSTICE ALITO: Is there any history of
23 states using Section 3 as a way to bar federal
24 officeholders?

25 MR. MITCHELL: Not that I'm aware, Justice

1 Alito, because of Griffin's Case. I mean, Griffin's
2 Case has been the law -- and I shouldn't say that
3 it's been the law because it was just a circuit court
4 decision, but that has been the settled understanding
5 of Section 3 since 1870 when it was decided.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

8 JUSTICE SOTOMAYOR: I just want to pin down
9 your principal argument on Section 3. You argue
10 that, even though the president may or may not
11 qualify -- presidency may or may not qualify as an
12 office under the United States, your principal
13 argument is that the president is not an officer of
14 the United States, correct?

15 MR. MITCHELL: Yeah, I would say it a
16 little more forcefully than what Your Honor just
17 described. We believe the presidency is excluded
18 from "office under the United States," but the
19 argument we have that he's excluded, the president,
20 as an officer of the United States is the stronger of
21 the two textually.

22 JUSTICE SOTOMAYOR: Ah.

23 MR. MITCHELL: It has fewer implications
24 for other constitutional --

25 JUSTICE SOTOMAYOR: A bit of a

1 gerrymandered rule, isn't it, designed to benefit
2 only your client?

3 MR. MITCHELL: I certainly wouldn't call it
4 gerrymandered. That implies nefarious intent. We're
5 --

6 JUSTICE SOTOMAYOR: Well, that you didn't
7 make it up. I know some scholars have been
8 discussing it. But just so we're clear, under that
9 reading, only -- only the Petitioner is disqualified
10 because virtually every other president except
11 Washington --

12 MR. MITCHELL: Mm-hmm.

13 JUSTICE SOTOMAYOR: -- has taken an oath to
14 support the Constitution, correct?

15 MR. MITCHELL: That's right. Every
16 president -- to our knowledge, every other president
17 -- John Adams might also be excluded because he took
18 the oath as a vice president, which is not an officer
19 -- but, yes, President Biden would certainly be
20 covered. He took the oath as a member of Congress.
21 And that's true of every previous president.

22 JUSTICE SOTOMAYOR: Would that be true if
23 we were to hold more narrowly in a reversal that it's
24 not Section 3 that's at issue but Thornton and others
25 as to whether Section 3 can be enforced by states

1 against the president?

2 MR. MITCHELL: That would extend to every
3 presidential candidate --

4 JUSTICE SOTOMAYOR: Exactly.

5 MR. MITCHELL: -- not just our client.
6 That's correct.

7 JUSTICE SOTOMAYOR: Not just to yours.

8 MR. MITCHELL: Yes.

9 JUSTICE SOTOMAYOR: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: And if I could just
12 understand, I mean, given that you say you don't have
13 a lot of evidence that the founding generation -- or
14 the generation that we're looking at is really
15 thinking about "office" versus "officer of the United
16 States," I mean, it -- it -- it would suggest that we
17 should ask what -- is that rule a sensible one? You
18 know, if they had thought about it, what reason would
19 they have given for that rule?

20 And it does seem as though there -- there's
21 no particular reason, and you can think of lots of
22 reasons for the contrary --

23 MR. MITCHELL: Right.

24 JUSTICE KAGAN: -- to say that the only
25 people who have engaged in insurrection who are not

1 disqualified from office are presidents who have not
2 held high office before. Why would that rule exist?

3 MR. MITCHELL: Yeah. I don't think there
4 is a good rationale given that this was compromise
5 legislation. And sometimes this happens with
6 statutory compromises and even constitutional
7 compromises. There's an agreed-upon set of words
8 that can pass both Houses of Congress, but different
9 legislators may have had goals and motivations. They
10 didn't all get their way. In a compromise, everyone
11 goes away miserable.

12 But this was the text that was settled
13 upon. And it does seem odd that President Trump
14 would fall through the cracks in a sense, but if
15 "officer of the United States" means appointed
16 officials, there's just no way he can be covered
17 under Section 3. The Court would have to reject our
18 officer argument to get to that point.

19 JUSTICE KAGAN: And is there any better
20 reason, if you go to the office argument that Justice
21 Jackson was suggesting, is there any better reason
22 for saying that an insurrectionist cannot hold the
23 whole panoply of offices in the United States, but
24 we're perfectly fine with that insurrectionist being
25 president?

1 MR. MITCHELL: I think that's an even
2 tougher argument for us to make as a policy matter
3 because one would think, of all offices, the
4 presidency would be the one you'd want to keep out
5 the Confederate insurrectionists. That's the
6 commander-in-chief of the Army. So, again, that's
7 why we're leaning more on the "officer of" argument
8 than the "office under."

9 We're not conceding "office under," but we
10 definitely have the stronger textual case and
11 structural case on "officer of the United States."

12 JUSTICE KAGAN: Thank you.

13 MR. MITCHELL: Thanks.

14 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

15 JUSTICE GORSUCH: Do you want to respond to
16 some of the specific textual arguments on the
17 "officer of" with respect to the Appointments Clause,
18 the Impeachment Clause, and some of the others?

19 MR. MITCHELL: Yeah. So the way -- let's
20 start with --

21 JUSTICE GORSUCH: But why --

22 MR. MITCHELL: Well, I'll start with the
23 Commissions Clause.

24 JUSTICE GORSUCH: The ball has been
25 bouncing --

1 MR. MITCHELL: Yeah.

2 JUSTICE GORSUCH: -- on that back and
3 forth, and I wanted to see where you landed today.

4 MR. MITCHELL: There are three textual
5 inferences that could be drawn from each of those
6 provisions Your Honor just mentioned, but the
7 Commissions Clause, I think, is the strongest because
8 it says "the president shall," you know, commission
9 all the officers of the United States. "Shall" is
10 mandatory. "All" is all-encompassing. And the
11 president doesn't commission himself, and he can't
12 commission himself. So that's one of the first
13 problems.

14 I think the Anderson litigants are trying
15 to say, you know, there's somehow an implied
16 exception there because the president obviously can't
17 commission himself, so we should construe that to
18 mean all officers of the United States besides the
19 president. But you also have members of Congress who
20 are not commissioned by the president, and that's
21 because they're not officers of the United States.

22 So the only sensible distinction that we
23 can see, given the language of the Commissions
24 Clause, is that officers of the United States are
25 appointed officials, and elected officials, such as

1 members of Congress and the president and the vice
2 president, are not.

3 And the Impeachment Clause reinforces that.
4 The president, the vice president, and all civil
5 officers of the United States shall be removed from
6 office upon impeachment for and conviction of all
7 high crimes and misdemeanors. The president and the
8 vice president are listed separately from officers of
9 the United States.

10 And then, of course, the Appointments
11 Clause, we know the president is not appointed
12 pursuant to Article II. Neither is the vice
13 president. Neither are members of Congress. So they
14 can't be officers either.

15 JUSTICE GORSUCH: And how does Article I,
16 Section 6, fit into this discussion?

17 MR. MITCHELL: And this is about officers
18 being in the line of succession?

19 JUSTICE GORSUCH: Yes, exactly.

20 MR. MITCHELL: Right. So you have to be an
21 officer to be in the line of succession. We have a
22 federal statute that puts the Speaker and the
23 President Pro Tempore in the line of succession.
24 They are officers. But they're not officers of the
25 United States because they're not subject to

1 impeachment, they're not commissioned by the
2 president, and they're not appointed pursuant to
3 Article II.

4 So there is this gap between the term
5 "officer" and the phrase "officers of the United
6 States," reinforcing the idea that "officers of the
7 United States" is a term of art that doesn't refer
8 just to federal officeholders, which is what the
9 Anderson litigants are claiming, but refers only to
10 those who are appointed, not to those who are
11 elected.

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

14 JUSTICE KAVANAUGH: Can I just make sure I
15 understand how you're using Griffin's Case again?
16 Section 3 refers to insurrection and raises questions
17 about who decides what processes are to be used.
18 That's ratified in 1868. The next year, Chief
19 Justice Chase opines that states do not have the
20 authority, that only Congress has the authority to
21 enforce that. That could be evidence, as you say, of
22 the original public meaning, at least some evidence.

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE KAVANAUGH: It's a precedent,
25 although not binding. But your point then is it's

1 reinforced because Congress itself relies on that
2 precedent in the Enforcement Act of 1870 and forms
3 the backdrop against which Congress does legislate.
4 And then, as Justice Alito says, the historical
5 practice for 155 years has been that that's the way
6 it's gone. There hasn't -- there haven't been state
7 attempts to enforce disqualification under Section 3
8 against federal officers in the years since.

9 MR. MITCHELL: Right.

10 JUSTICE KAVANAUGH: So whether that's a
11 Federalist 37 liquidation argument, it all reinforces
12 what happened back in 1868, 1869, and 1870.

13 MR. MITCHELL: Right.

14 JUSTICE KAVANAUGH: Do you want to add to
15 that, alter that?

16 MR. MITCHELL: No, I think that's exactly
17 right. And the last part you mentioned, Your Honor,
18 is crucial to our argument, that Congress relied on
19 Griffin's Case. It provided the backdrop against
20 which they legislated, which is why we should read
21 these extant enforcement mechanisms -- and, right
22 now, the only one left is the federal insurrection
23 statute, 2383 -- as exclusive of state court
24 remedies. It's a -- it's a form of implied
25 preemption, almost Sea Clammers implicit preemption

1 of other remedies, because Congress made these
2 decisions in explicit reliance on Griffin's Case.

3 JUSTICE KAVANAUGH: And if we agree with
4 you on Griffin's Case and what you've elaborated on
5 there, that's the end of the case, right?

6 MR. MITCHELL: It should be, yes, unless
7 Congress decides to enact a statute, which we can't
8 --

9 JUSTICE KAVANAUGH: A new --

10 MR. MITCHELL: -- rule out the possibility.

11 JUSTICE KAVANAUGH: -- a new statute in
12 addition to 2383. And just to be clear, under 2383,
13 you agree that someone could be prosecuted for
14 insurrection by federal prosecutors and, if
15 convicted, could be or shall be disqualified then
16 from office?

17 MR. MITCHELL: Yes. But the only caveat
18 that I would add is that our client is arguing that
19 he has presidential immunity. So we would not
20 concede that he can be prosecuted for what he did on
21 January 6th under 2383.

22 JUSTICE KAVANAUGH: Understood. Asking --

23 MR. MITCHELL: Yes.

24 JUSTICE KAVANAUGH: -- the question about
25 the theory of 2383. Thank you.

1 MR. MITCHELL: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Barrett?

3 JUSTICE BARRETT: So Griffin's Case was a
4 collateral proceeding, so it's habeas relief.

5 MR. MITCHELL: Yes.

6 JUSTICE BARRETT: Could Griffin have -- so
7 even if Section 3 is not a basis for collateral
8 relief in habeas, which was new at the time, could
9 Griffin have raised at his trial or in direct appeal
10 the argument that Sheffey, Judge Sheffey, you know,
11 you can't legitimately sit -- or constitutionally sit
12 on my case because you're an insurrectionist and
13 you're disqualified? Could he have won then?

14 MR. MITCHELL: No.

15 JUSTICE BARRETT: Why?

16 MR. MITCHELL: Not if -- not if Griffin's
17 Case is correct. So a court would have to reject the
18 rationale of Griffin's Case to accept what Your Honor
19 was suggesting.

20 JUSTICE BARRETT: Well, why? Like I said,
21 Griffin's Case -- I mean, I think there's some
22 language that might be a little bit broad --

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE BARRETT: -- but, at bottom,
25 Griffin's Case is about a collateral habeas

1 proceeding. And Griffin had brought his case after
2 the fact. He made it a cause of action.

3 Why wouldn't it work in a trial for him to
4 challenge Sheffey's constitutional ability to
5 adjudicate his case?

6 MR. MITCHELL: But what Griffin's Case
7 holds is that only Congress can provide the means of
8 enforcing Section 3. And under Your Honor's
9 hypothetical, Congress has not enacted any such
10 statute that would give Mr. Griffin the right to
11 raise those types of arguments at his trial. So he
12 would have to await legislation from Congress.

13 JUSTICE BARRETT: Okay. Let's assume that
14 I disagree with you about the officer argument, so
15 Section 3 covers President Trump. Let's say that
16 Congress enacts a quo warranto provision that would
17 allow a state or I guess it doesn't really matter for
18 this purpose, even -- even a federal prosecutor, to
19 bring such an action against him to remove him from
20 office --

21 MR. MITCHELL: Mm-hmm.

22 JUSTICE BARRETT: -- in a quo warranto way.

23 Wouldn't that be in some tension with
24 impeachment? He would be extracted from office
25 outside of the process of impeachment. Couldn't then

1 President Trump simply say, well, the only way to get
2 me out of office is the impeachment process and not
3 this quo warranto action?

4 MR. MITCHELL: So I don't know how that
5 would play out because the quo warranto actions that
6 were brought that I'm aware of under the 1870
7 Enforcement Act were brought against state officials.
8 And Your Honor's impeachment hypothetical would apply
9 not only to the president but any federal --

10 JUSTICE BARRETT: I know.

11 MR. MITCHELL: -- officer of the United
12 States.

13 JUSTICE BARRETT: I know.

14 MR. MITCHELL: So I don't know how that
15 played out in the courts and whether anyone ever
16 tried to argue that impeachment was the exclusive
17 remedy for --

18 JUSTICE BARRETT: Well, I don't think
19 anybody did argue it. I guess what I'm asking is,
20 you know, you said it's Congress's exclusive
21 province.

22 MR. MITCHELL: Yes.

23 JUSTICE BARRETT: And you also said that it
24 has to apply, you know, after one is holding office,
25 is elected. And I'm asking whether then the

1 implication of your argument is that Congress could
2 not enact such a provision that applied against
3 federal officeholders that were covered by Section 3
4 as opposed to state ones?

5 MR. MITCHELL: I believe they could. The
6 Impeachment Clause says that the president, the vice
7 president, and also the officers of the United States
8 shall be removed from office upon impeachment and
9 conviction, but it doesn't say that's the only way
10 you can remove them.

11 I mean, Congress can defund a position and
12 effectively, it's not quite the same as formal
13 removal, but the other relevant precedent is Stuart
14 against Laird when the Jeffersonians repealed the
15 Midnight Judges Act and abolished all of these
16 positions for federal judges. And some people
17 thought that was unconstitutional because they
18 thought the only way you could eliminate federal
19 judges was through impeachment, but Chief Justice
20 Marshall upheld that statute.

21 So that to me is a relevant precedent
22 showing that impeachment is not the only way to get
23 rid of a federal official.

24 JUSTICE BARRETT: Okay. Let me ask one
25 question, and this is just a point of clarification.

1 Does President Trump have any kind of due
2 process right here? I mean, I'm wondering, this kind
3 of goes not to the cause of action point or the
4 preemption point but more to the question of what
5 procedures he might have been entitled to. You don't
6 make the argument that he was entitled to any, nor
7 did I see the argument that he had any kind of
8 constitutionally protected right to ballot access so
9 that he was, you know, constitutionally entitled to
10 an opportunity to be heard.

11 Is that right?

12 MR. MITCHELL: We -- we made --

13 JUSTICE BARRETT: He had no due process
14 right?

15 MR. MITCHELL: We made that argument below.
16 We did not make that in our briefs to this Court for
17 several reasons. I mean, Your Honor's, I think,
18 suggesting and this is correct that the proceedings
19 below, to put it charitably, were highly irregular.

20 JUSTICE BARRETT: Well, I wasn't suggesting
21 that. I was just asking --

22 MR. MITCHELL: I'm sorry. The question --

23 JUSTICE BARRETT: Yeah.

24 MR. MITCHELL: -- seems to suggest that
25 there might be due process issues. But we didn't

1 develop that argument in this Court for several
2 issues.

3 Winning on due process doesn't really do as
4 much for our client as the other arguments that we've
5 made because that would be a ruling specific to this
6 particular proceeding in the State of Colorado and
7 would leave the door open for Colorado to continue on
8 remand to exclude him from the ballot.

9 JUSTICE BARRETT: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Jackson?

11 JUSTICE JACKSON: Going back to whether the
12 presidency is one of the barred offices, I -- I guess
13 I'm a little surprised at your response to Justice
14 Kagan because I thought that the history of the
15 Fourteenth Amendment actually provides the reason for
16 why the presidency may not be included.

17 And by that, I mean I didn't see any
18 evidence that the presidency was top of mind for the
19 Framers when they were drafting Section 3 because
20 they were actually dealing with a different issue.

21 The pressing concern, at least as I see the
22 historical record, was actually what was going on at
23 lower levels of the government, the possible
24 infiltration and embedding of insurrectionists into
25 the state government apparatus and the real risk that

1 former Confederates might return to power in the
2 south via state-level elections either in local
3 offices or as representatives of the states in
4 Congress. And that's a very different lens.

5 Your concern is trying to make sure that
6 these people don't come back through the state
7 apparatus and control the government in that
8 direction seems to me very different than the worry
9 that an insurrectionist will seize control of the
10 entire national government through the presidency.

11 And so I just am surprised that you would
12 -- given the text of the provision and the historical
13 context that seems to demonstrate that their concern
14 or their focus was not about the presidency, I just
15 don't understand why you're giving that argument up.

16 MR. MITCHELL: There -- there is some
17 evidence to suggest that, Justice Jackson, but --

18 JUSTICE JACKSON: Is there any evidence to
19 suggest that the presidency was what they were
20 focused on?

21 MR. MITCHELL: There is some evidence of
22 that. There were people saying we don't want
23 Jefferson Davis to be elected president, and there
24 was also -- one of the drafts of Section 3
25 specifically mentioned the presidency and the vice

1 presidency --

2 JUSTICE JACKSON: But it wasn't the final

3 --

4 MR. MITCHELL: -- as an office.

5 JUSTICE JACKSON: -- but it wasn't the
6 final enactment. So where do you --

7 MR. MITCHELL: It wasn't the final -- it
8 wasn't --

9 JUSTICE JACKSON: Right.

10 MR. MITCHELL: I'm sorry. It wasn't the
11 final enactment, but it does show that there was some
12 concern by some people about Confederate
13 insurrectionists ascending to the presidency.

14 And we didn't want to make a law office
15 history type argument where you just look at the
16 historical evidence and pick the evidence that we
17 like and interpret it tangentially because the other
18 side can come back with us and throw this
19 countervailing evidence back in our face.

20 So we wanted to focus more on the text of
21 the Constitution because this was ultimately a
22 compromise provision that was enacted in Section 3,
23 and --

24 JUSTICE JACKSON: All right. Let me ask
25 you another question --

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE JACKSON: -- about the states
3 because you have forcefully made an argument about
4 the states not being able to enforce Section 3.

5 So, if we agree with you on that, what
6 happens next? I mean, I thought you also wanted us
7 to end the litigation. So is there a possibility
8 that this case continues in federal court if that's
9 our conclusion?

10 MR. MITCHELL: I don't see how it could
11 unless Congress were to enact a statute in response
12 to this Court's decision.

13 JUSTICE JACKSON: So your point is that it
14 would -- we would have to say congressional enacting
15 legislation is necessary for either state or federal
16 enforcement?

17 MR. MITCHELL: That's correct.

18 JUSTICE JACKSON: All right. Final
19 question. The Colorado Supreme Court concluded that
20 the violent attempts of the Petitioner's supporters
21 in this case to halt the count on January 6th
22 qualified as an insurrection as defined by Section 3.

23 And I read your opening brief to accept
24 that those events counted as an insurrection, but
25 then your reply seemed to suggest that they were not.

1 So what is your position as to that?

2 MR. MITCHELL: Oh, we -- we never accepted
3 or conceded in our opening brief that this was an
4 insurrection. What we said in our opening brief was
5 President Trump did not engage in any act that can
6 plausibly be characterized as insurrection because he
7 did not engage --

8 JUSTICE JACKSON: All right. So why would
9 this not be an -- what is your argument that it's not
10 -- your reply brief says that it wasn't because, I
11 think, you say, it did not involve an organized
12 attempt to overthrow the government. So --

13 MR. MITCHELL: That's one of many reasons.
14 But, for an insurrection, there needs to be an
15 organized, concerted effort to overthrow the
16 government of the United States through violence.
17 And this riot that occurred --

18 JUSTICE JACKSON: So your point is that a
19 chaotic effort to overthrow the government is not an
20 insurrection?

21 MR. MITCHELL: No, we didn't concede that
22 it's an effort to overthrow the government either,
23 Justice Jackson. None of these criteria were met.
24 This was a riot. It was not an insurrection. The
25 events were shameful, criminal, violent, all of those

1 things, but it did not qualify as insurrection as
2 that term is used in Section 3 because --

3 JUSTICE JACKSON: Thank you.

4 MR. MITCHELL: Thanks.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. MITCHELL: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Murray.

8 ORAL ARGUMENT OF JASON C. MURRAY

9 ON BEHALF OF RESPONDENTS ANDERSON, ET AL.

10 MR. MURRAY: Mr. Chief Justice, and may it
11 please the Court:

12 We are here because, for the first time
13 since the War of 1812, our nation's capitol came
14 under violent assault. For the first time in
15 history, the attack was incited by a sitting
16 president of the United States to disrupt the
17 peaceful transfer of presidential power.

18 By engaging an insurrection against the
19 Constitution, President Trump disqualified himself
20 from public office. As we heard earlier, President
21 Trump's main argument is that this Court should
22 create a special exemption to Section 3 that would
23 apply to him and to him alone. He says Section 3
24 disqualifies all oath-breaking insurrectionists,
25 except a former president who never before held other

1 state or federal office.

2 There is no possible rationale for such an
3 exemption, and the Court should reject the -- the
4 claim that the Framers made an extraordinary mistake.
5 Section 3 uses deliberately broad language to cover
6 all positions of federal power requiring an oath to
7 the Constitution.

8 My friend relies on a claimed difference
9 between "an office under" and "an officer of the
10 United States," but this case does not come down to
11 mere prepositions. The two phrases are two sides of
12 the same coin, referring to any federal office or to
13 anyone who holds one.

14 President Trump's other arguments for
15 reversal ignore the constitutional role of the states
16 in running presidential elections. Under Article II
17 and the Tenth Amendment, states have the power to
18 ensure that their citizens' electoral votes are not
19 wasted on a candidate who is constitutionally barred
20 from holding office.

21 States are allowed to safeguard their
22 ballots by excluding those who are under age,
23 foreign-born, running for a third presidential term,
24 or, as here, those who have engaged in insurrection
25 against the Constitution, in violation of their oath.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Do you have
3 contemporaneous examples -- and by contemporaneous, I
4 mean shortly after the adoption of the Fourteenth
5 Amendment -- where the states disqualified national
6 candidates, not its own candidates, but national
7 candidates?

8 MR. MURRAY: The only example I can think
9 of, Justice Thomas, is the example of governor -- of
10 -- of Congressman Christy, who was elected in Georgia
11 in I believe 1868, and the governor of Georgia
12 refused -- or -- or declined to certify the results
13 of that election because Mr. Christy was
14 disqualified.

15 But I think it's not surprising that there
16 are few examples because we didn't have ballots in
17 the same way back then. Candidates were either
18 write-in or they were party ballots, so the states
19 didn't run the ballots in the same way, and there
20 wouldn't have been a process for determining before
21 an election whether a candidate was qualified, unlike
22 the processes that we have now that states have
23 created under their Article I and Article II powers
24 to run elections.

25 JUSTICE THOMAS: But it would seem that

1 particularly after Reconstruction and after the
2 Compromise of 1877 and during the period of redeemers
3 that you would have that kind of conflict. There
4 were a plethora of Confederates still around. There
5 were any number of people who would continue to
6 either run for state offices or national offices.

7 So it would seem -- that would suggest that
8 there would at least be a few examples of national
9 candidates being disqualified if your reading is
10 correct.

11 MR. MURRAY: Well, there were certainly
12 national candidates who were disqualified by Congress
13 refusing to seat them.

14 JUSTICE THOMAS: I understand that, but
15 that's not this case. I'm talking -- did states
16 disqualify them? That's what we're talking about
17 here. I understand Congress would not seat them.

18 MR. MURRAY: Other than the example I gave,
19 no, but, again, Your Honor, that's not surprising
20 because there wouldn't have been -- states certainly
21 wouldn't have the authority to remove a sitting
22 federal officer.

23 JUSTICE THOMAS: So what's the purpose of
24 the -- what was the purpose of the -- of Section 3?
25 The states were sending people -- the concern was

1 that the former Confederate states would continue
2 being bad actors, and the effort was to prevent them
3 from doing this.

4 And you're saying that, well, this also
5 authorized states to disqualify candidates. So what
6 I'm asking you for, if you are right, what are the
7 examples?

8 MR. MURRAY: Well, Your Honor, the examples
9 are states excluded many candidates for state office,
10 individuals holding state offices. We have a number
11 of published cases of states concerning that.

12 JUSTICE THOMAS: I understand that. I -- I
13 understand the states controlling state elections and
14 state positions. What we are talking about here are
15 national candidates.

16 The -- I understand. You look at Foner or
17 Foote, Shelby Foote, or McPherson, they all talk
18 about, of course, the conflict after the Civil War,
19 and there were people who felt very strongly about
20 retaliating against the South, the radical
21 Republicans, but they did not think about authorizing
22 the South to disqualify national candidates.

23 And that's the argument you're making, and
24 what I would like to know is you give -- is do you
25 have any examples of this?

1 MR. MURRAY: Many of those historians have
2 filed briefs in our support in this case, making the
3 point that the -- the -- the idea of the Fourteenth
4 Amendment was that both states and the federal
5 government would ensure rights and that if states
6 failed to do so, the federal government certainly
7 would also step in.

8 But I think the reason why there aren't
9 examples of states doing this is an idiosyncratic one
10 of the fact that elections worked differently back
11 then. States have a background power under Article
12 II and the Tenth Amendment to run presidential
13 elections. They didn't use that power to police
14 ballot access until about the 1890s. And by the
15 1890s, everyone had received amnesty and these issues
16 had become moot. So I don't think the history tells
17 us --

18 CHIEF JUSTICE ROBERTS: I'd like to sort of
19 look at Justice Thomas's question sort of from the
20 30,000-foot level. I mean, the whole point of the
21 Fourteenth Amendment was to restrict state power,
22 right? States shall not abridge privilege of
23 immunity, they won't deprive people of property
24 without due process, they won't deny equal
25 protection. And on the other hand, it augmented

1 federal power under Section 5. Congress has the
2 power to enforce it.

3 So wouldn't that be the last place that
4 you'd look for authorization for the states,
5 including Confederate states, to enforce --
6 implicitly authorized to enforce the presidential
7 election process? That -- that seems to be a
8 position that is at -- at war with the whole thrust
9 of the Fourteenth Amendment and very ahistorical.

10 MR. MURRAY: No, Your Honor. First, we
11 would locate the states' authority to run
12 presidential elections not in the Fourteenth
13 Amendment but in Article II. And that power is
14 merely plenary to determine the means --

15 CHIEF JUSTICE ROBERTS: Yeah, but you're
16 relying on -- you have no reliance on Section 3, is
17 that what you're saying?

18 MR. MURRAY: No, Your Honor. Certainly, we
19 have reliance on Section 3 insofar as Article II
20 gives states this broad power to determine how their
21 electors are selected, and that broad power implies
22 the narrower power to enforce federal constitutional
23 qualifications like --

24 CHIEF JUSTICE ROBERTS: Well, but the
25 narrower power you're looking for is the power of

1 disqualification, right? That is a very specific
2 power in the Fourteenth Amendment. And you're saying
3 that was implicitly extended to the states under a
4 clause that doesn't address that at all?

5 MR. MURRAY: We would say that nothing in
6 the Fourteenth Amendment takes away from the states
7 their broad and merely plenary power to determine the
8 manner of selecting their electors in the manner that
9 they see fit. As this Court said in Chiafalo, that
10 power is merely plenary unless something in the
11 Constitution tells states they can't do it.

12 And -- and the structure of the Fourteenth
13 Amendment certainly was intended to expand federal
14 power and certainly to restrict state power in some
15 ways, but states are bound to enforce and apply, for
16 example, Section 1 of the Fourteenth Amendment. And
17 so it's hard to see why states wouldn't be similarly
18 bound or at least authorized --

19 JUSTICE KAVANAUGH: But that's -- that's a
20 --

21 JUSTICE KAGAN: Well, just --

22 JUSTICE KAVANAUGH: -- "greater includes
23 the lesser" argument. The -- the states have the
24 power, the legislature has the power to choose
25 electors. Granted. But just because there's one

1 authorized means in the Constitution to a particular
2 end does not mean that there's any means to that end.

3 And so I think you're taking that electors
4 argument and bringing it into Section 3, where, as
5 the Chief Justice says, there's just no -- and
6 Justice Thomas, there's no historical evidence to
7 support kind of the theory of Section 3, nor the
8 overall -- to explain the overall structure of -- of
9 the Fourteenth Amendment.

10 MR. MURRAY: We certainly have a long
11 history in this country of states using their power
12 to determine the manner of selecting presidential
13 electors to enforce other qualifications in the
14 Constitution. I don't -- I don't take it there's a
15 great debate about whether or not states are allowed
16 to exclude underaged or foreign-born candidates or,
17 if President Bush or Obama wanted to run for a third
18 term, that they could be excluded under that broad
19 Article II power.

20 I don't see why Section 3 should be treated
21 any differently. Section 3 speaks in the same
22 mandatory terms.

23 JUSTICE KAVANAUGH: Well, when you look at
24 Section 3, the term "insurrection" jumps out, and the
25 question is -- the questions are: What does that

1 mean? How do you define it? Who decides? Who
2 decides whether someone engaged in it? What
3 processes -- as Justice Barrett alluded to, what
4 processes are appropriate for figuring out whether
5 someone did engage in that?

6 And that's all what Chief Justice Chase
7 focused on a year after the Fourteenth Amendment to
8 say these are difficult questions and you look right
9 at Section 5 of the Fourteenth Amendment, as the
10 Chief Justice said, and that tells you Congress has
11 the primary role here.

12 I think what's different is -- is the
13 processes, the definition, who decides questions
14 really jump out at you when you look at Section 3.

15 MR. MURRAY: Cert --

16 JUSTICE KAVANAUGH: Your response to that?

17 MR. MURRAY: Well, certainly, Justice
18 Kavanaugh, there has to be some process for
19 determining those questions, and then the question
20 becomes, does anything in the Fourteenth Amendment
21 say that only Congress can create that process? And
22 Section 5 very clearly is not an exclusive provision.
23 It says Congress shall have power. And --

24 JUSTICE KAGAN: But maybe put most boldly,
25 I think that the question that you have to confront

1 is why a single state should decide who gets to be
2 president of the United States. In other words, you
3 know, this question of whether a former president is
4 disqualified for insurrection to be president again
5 is, you know, just say it, it sounds awfully national
6 to me. So whatever means there are to enforce it
7 would suggest that they have to be federal, national
8 means.

9 Why does -- you know, if you weren't from
10 Colorado and you were from Wisconsin or you were from
11 Michigan and it really -- you know, what the Michigan
12 secretary of state did is going to make the
13 difference between, you know, whether Candidate A is
14 elected or Candidate B is elected, I mean, that seems
15 quite extraordinary, doesn't it?

16 MR. MURRAY: No, Your Honor, because,
17 ultimately, it's this Court that's going to decide
18 that question of federal constitutional eligibility
19 and settle the issue for the nation. And, certainly,
20 it's not unusual that questions of national
21 importance come up through different states.

22 JUSTICE KAGAN: Well, I suppose this Court
23 would be saying something along the lines of that a
24 state has the power to do it. But I guess I was -- I
25 was asking you to go a little bit further in saying

1 why should that be the right rule? Why should a
2 single state have the ability to make this
3 determination not only for their own citizens but for
4 the rest of the nation?

5 MR. MURRAY: Because Article II gives them
6 the power to -- to appoint their own electors as they
7 see fit. But if they're going to use a federal
8 constitutional qualification as a ballot access
9 determinant, then it's creating a federal
10 constitutional question that then this Court decides
11 and other courts, other states -- if this Court
12 affirms the decision below, determining that
13 President Trump is ineligible to be president, other
14 states would still have to determine what effect that
15 would have on their own state's law and state
16 procedure --

17 JUSTICE BARRETT: Well, if we --

18 MR. MURRAY: -- in terms of how --

19 JUSTICE BARRETT: If we affirmed and we
20 said he was ineligible to be president, yes, maybe
21 some states would say well, you know, we're going to
22 keep him on the ballot anyway but, I mean, really
23 it's going to have, as Justice Kagan said, the effect
24 of Colorado deciding. And it's true, I just want to
25 push back a little bit on well, it's a national thing

1 because this Court will decide it.

2 You say that we have to review Colorado's
3 factual record with clear error as the standard of
4 review. So we would be stuck. The first mover state
5 here, Colorado, we're stuck with that record. And,
6 you know, I -- I -- I don't want to get into whether
7 the -- the record -- I mean, maybe the record is
8 great, but what if the record wasn't? I mean, what
9 if it wasn't a fulsome record? What if, you know,
10 the hearsay rules are, you know, one-offs or what if
11 this is just made by the secretary of state without
12 much process at all?

13 How do we review those factual findings?
14 Why should clear error review apply and doesn't that
15 buckle back into this point that Justice Kagan was
16 making, you know, that -- that we made with Mr.
17 Mitchell too that it just doesn't seem like a state
18 call?

19 MR. MURRAY: Three points, Your Honor. The
20 first is that ordinarily, of course this Court
21 reviews factual findings for clear error but
22 President Trump made the point in -- in his reply
23 brief that sometimes on constitutional questions that
24 require a uniform resolution, this Court can do more,
25 something more like a Bose Corp. Style independent

1 review of the factual record.

2 And we would have no objection to that,
3 given that the record here -- really -- really the
4 facts that are disputed here are incredibly narrow.
5 The essence of our case is President Trump's own
6 statements that he made in public view for all to
7 see.

8 JUSTICE BARRETT: But then that's saying
9 that in this context, which is very high stakes, if
10 we review the facts essentially de novo you want us
11 all to just watch the video of the ellipse and then
12 make a decision without any deference to or guidance
13 from lower court fact finding? That's unusual.

14 MR. MURRAY: Well, ultimately President
15 Trump himself urges this Court to decide the merits
16 of his eligibility on the factual record here at page
17 2 of his brief. He's never at any point in this
18 proceeding suggested there was something else that
19 needed to be in the factual record, any other
20 witnesses that he wanted to call to present his case
21 and, again, the essence of our case is his own
22 statements.

23 And -- and -- and in particular, his own
24 videotaped statements on the ellipse --

25 JUSTICE GORSUCH: Mr. Murray, just to

1 circle back -- I'm sorry to interrupt. But I
2 wanted -- before we left it, I wanted to circle back
3 to where Justice Kagan was.

4 Do you agree that the state's powers here
5 over its ballot for federal officer election have to
6 come from some constitutional authority?

7 MR. MURRAY: Members of this Court have
8 disagreed about that.

9 JUSTICE GORSUCH: I'm asking you.

10 (Laughter.)

11 MR. MURRAY: The -- the majority of this
12 Court has said that those powers come from Article
13 II. But we think that the result is the same,
14 whether the Court locates it in Article II or in a
15 reserved power under the Tenth Amendment.

16 JUSTICE GORSUCH: Okay. But you accept
17 that this Court has held, you're not contesting this
18 or asking us to revisit that decision in Thornton or
19 Term Limits or whatever you want to call it that has
20 to come from some federal constitutional authority?

21 MR. MURRAY: No, we are not, Your Honor.

22 JUSTICE GORSUCH: Okay. And -- and -- and
23 here we're not talking about the Qualifications
24 Clause, right? Nobody's talking about whether he's
25 35 years old or a natural born, whatever, right, not

1 at issue, okay.

2 We're talking about something under the
3 Fourteenth Amendment and Section 3, so that's where
4 you have to find your authority, right?

5 MR. MURRAY: We find our authority in
6 Article II in state's plenary power to run their
7 elections.

8 JUSTICE GORSUCH: Federal election -- but
9 this is for a federal office. It has to come from
10 the Constitution. And you're seeking to enforce
11 Section 3?

12 MR. MURRAY: We're suggesting that in their
13 broad power to determine the -- to select
14 presidential electors in any manner they see fit,
15 they can take account of Section 3 and apply Section
16 3 --

17 JUSTICE GORSUCH: Could they do it without
18 Section 3? Could they disqualify somebody for -- you
19 know, on whatever basis they wanted outside of the
20 Qualifications Clause?

21 MR. MURRAY: That would run into Term
22 Limits.

23 JUSTICE GORSUCH: Yeah, I would think so.
24 So it has to come back to Section 3. And if that's
25 true, how does that work given that Section 3 talks

1 about holding office, not who may run for office. It
2 was a point Mr. Mitchell was making earlier and I
3 just wanted to give you a chance to respond to it
4 because it seems to me that -- that, you know, that
5 you're asking to enforce in an election context a
6 provision of the Constitution that speaks to holding
7 an office. So it's different than the Qualifications
8 Clause, which is all about who can run and then
9 serve, yeah.

10 MR. MURRAY: I -- I don't know that it is
11 different.

12 JUSTICE GORSUCH: Okay.

13 MR. MURRAY: Other qualifications for
14 office similarly talk about eligibility for the
15 office. There's nothing unconstitutional about a
16 30-year-old trying to get on the ballot.

17 JUSTICE GORSUCH: Except for this
18 disability can be removed, right, under Section 3.
19 That's what's different about it. So, thoughts on
20 that?

21 MR. MURRAY: Well -- well, the fact that
22 there's an extraordinary provision for removing the
23 disability does not negate the fact that the
24 disability exists today and it's existed since
25 January 6th, 2021 when President Trump engaged in

1 insurrection against the Constitution.

2 JUSTICE GORSUCH: So were his actions after
3 that date, before he left office, ultra vires, is
4 that -- is that where your theory leads?

5 MR. MURRAY: Well, that would raise the
6 separate question of whether one can collaterally
7 attack the actions of a de facto officer. And that
8 may be the one place in Griffin's case's at the very
9 end where we would agree which is -- which is when
10 Justice Chase said I've talked to my Supreme Court
11 colleagues and we unanimously agree that you can't
12 collaterally attack all official actions of an
13 officer who's holding -- who's, in fact, holding the
14 position.

15 JUSTICE GORSUCH: All right. But just
16 circle back to where we started, right? This is
17 Section 3. Your authority has to come from there.
18 And it's about holding office and it's a particular
19 kind of disability that can be removed by Congress
20 and it's the only one like that, right? They can't
21 remove age or citizenship.

22 How should that inform our thoughts about a
23 state's efforts to regulate the ballot for a federal
24 office?

25 MR. MURRAY: The colloquy that my friend

1 had with Justice Alito earlier, I think is
2 illustrative here. The fact that Congress has an
3 extraordinary removal power does not negate that the
4 disability exists today and exists indefinitely into
5 the future, much like the fact that Congress -- that
6 the president can pardon somebody for criminal
7 conviction doesn't make that conviction somehow --
8 somehow contingent.

9 And -- and I would note that if President
10 Trump were appointed to an office today, if he were
11 appointed as a state judge, he could not hold that
12 office, which shows that the disability exists now.

13 And -- and the fact that Congress has a
14 power to remove the disability doesn't negate the
15 present qualification, nor does it implicitly bestow
16 on President Trump a constitutional right to run for
17 offices that he cannot hold in violation of state law
18 and state procedure under Article II.

19 JUSTICE SOTOMAYOR: In fact, there was a --
20 a congressional action to permit confederate officers
21 or people who supported the confederacy to hold
22 office before the Fourteenth Amendment, correct? So
23 there must have been a thought that there was a -- a
24 preexisting disqualification.

25 MR. MURRAY: That's absolutely right.

1 There were a flood of amnesty requests, even before
2 Section 3 went into effect because everybody
3 understood at the time that those people would be
4 disqualified the moment that Section 3 was enacted
5 forever, unless they received amnesty.

6 CHIEF JUSTICE ROBERTS: Counsel, what do
7 you do with the -- what would seem to me to be plain
8 consequences of your position. If -- if Colorado's
9 position is upheld, surely there will be
10 disqualification proceedings on the other side. And
11 some of those will succeed.

12 Some of them will have different standards
13 of proof. Some of them will have different rules
14 about evidence. Maybe the Senate report won't be
15 accepted. In others because it's hearsay. Maybe
16 it's beyond a reasonable doubt, whatever.

17 In very quick order, I would expect,
18 although my predictions never have been correct --

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: -- I would expect
21 that, you know, a goodly number of states will say,
22 whoever the democratic candidate is, you're off the
23 ballot. And others for the Republican candidate,
24 you're off the ballot. It'll come down to just a
25 handful of states that are going to decide the

1 presidential election. That's a pretty daunting
2 consequence.

3 MR. MURRAY: Well, certainly, Your Honor,
4 the fact that there are potential frivolous
5 applications of a constitutional provision isn't a
6 reason --

7 CHIEF JUSTICE ROBERTS: Well now, hold on.
8 You might think they're frivolous but the people who
9 are bringing them may not think they're frivolous.
10 Insurrection is a broad, broad term. And if there's
11 some debate about it, I suppose that will go into the
12 decision and then eventually, what, we would be
13 deciding whether it was an insurrection when one
14 president did something as opposed to when somebody
15 else did something else? And what do we do? Do we
16 wait until near the time of counting the ballots and
17 sort of go through which states are valid and which
18 states aren't?

19 MR. MURRAY: There's a reason Section 3 has
20 been dormant for 150 years. And it's because we
21 haven't seen anything like January 6th since
22 reconstruction.

23 Insurrection against the Constitution is
24 something extraordinary. And --

25 CHIEF JUSTICE ROBERTS: It seems to me

1 you're avoiding the question, which is other states
2 may have different views about what constitutes
3 insurrection.

4 And now you're saying well, it's all right,
5 because somebody, presumably us, are going to decide,
6 well, they said they thought that was an insurrection
7 but they were wrong. And maybe they thought it was
8 right. And we'd have to develop rules for what
9 constitutes an insurrection.

10 MR. MURRAY: Yes, Your Honor, just like
11 this Court interprets other constitutional
12 provisions, this Court can make clear that an
13 insurrection against the Constitution is something
14 extraordinary.

15 And, in particular, it really requires a
16 concerted group effort to resist through violence,
17 not some ordinary application of state or federal
18 law, but the functions mandated by the Constitution
19 itself.

20 JUSTICE KAVANAUGH: On -- on your point it
21 that it's been dormant for 155 years, I think the
22 other side would say the reason for that is Chief
23 Justice Chase's opinion in 1869 in Griffin's Case to
24 start, which says that Congress has the authority
25 here, not the states. That's followed up by the

1 Enforcement Act of 1870, in which Congress acts upon
2 that understanding, which is followed -- and there's
3 no history contrary in that period, as Justice Thomas
4 pointed out, there's no history contrary in all the
5 years leading up to this of states exercising such
6 authority.

7 I think the reason it's been dormant is
8 because there's been a settled understanding that
9 Chief Justice Chase, even if not right in every
10 detail, was essentially right, and the branches of
11 the government have acted under that settled
12 understanding for 155 years.

13 And Congress can change that. And Congress
14 does have Section 2383, of course, the Insurrection
15 Act, a criminal statute. But Congress could change
16 it, but they have not, in the 155 years, in relevant
17 respects for what you want here today, at least.

18 MR. MURRAY: No, Justice Kavanaugh. The
19 reason why it's been dormant is because, by 1876,
20 essentially all former Confederates had received
21 amnesty. And we haven't seen anything like an
22 insurrection since then.

23 I'd like to address your point --

24 JUSTICE ALITO: Well, you know, we didn't
25 --

1 JUSTICE SOTOMAYOR: Can I go to that
2 point --

3 JUSTICE ALITO: After the --

4 JUSTICE SOTOMAYOR: Sorry.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: I don't know how much we
7 can infer from the fact that we haven't seen anything
8 like this before and therefore conclude that we're --
9 we're not going to see something in the future.

10 From the time of the impeachment of
11 President Johnson until the impeachment of President
12 Clinton more than 100 years later, there were no
13 impeachments of presidents. And in fairly short
14 order, over the last couple of decades, we've had
15 three. So I don't know how much you can infer from
16 that.

17 MR. MURRAY: Certainly, but if this Court
18 affirms, this Court can write an opinion that
19 emphasizes how extraordinary insurrection against the
20 Constitution is and how rare that is because it
21 requires an assault, not just on the application of
22 law, but on constitutionally mandated functions
23 themselves, like we saw on January 6th, a coordinated
24 attempt to -- to disrupt a function mandated by the
25 Twelfth Amendment and essential to constitutional

1 transfer of presidential power.

2 JUSTICE ALITO: Well, let me ask you a
3 question about whether the power that you've
4 described as plenary really is plenary. Suppose that
5 the outcome of an election for president comes down
6 to the vote of a single state, how the electors of
7 the vote of a single state are going to vote. And
8 suppose that candidate A gets a majority of the votes
9 in that state, but the legislature really doesn't
10 like candidate A, thinks candidate A is an
11 insurrectionist, so the legislature then passes a law
12 ordering its electors to vote for the other
13 candidate.

14 Do you think the state has that power?

15 MR. MURRAY: I think there may be
16 principles that come into play in terms of after the
17 people have voted, that Congress -- that the state
18 can't change the rules midstream. I'm not sure
19 because I'm not aware of this Court addressing it.
20 And, certainly, as the --

21 JUSTICE ALITO: Well, let's change it so
22 that it's not after the election; it's three days
23 before the election based on the fact that the polls
24 in that state look bad. Can they do it?

25 MR. MURRAY: I think they probably could

1 under this Court's decision in Chiafalo, where this
2 Court emphasized that, for much of American history,
3 state legislatures picked their -- their own electors
4 and assigned their own electors themselves. But, of
5 course, that would be much more extraordinary than
6 what we have here, which is simple application of
7 normal state ballot access principles to say that
8 we're only going to put on the ballot an individual
9 who is qualified to assume the office.

10 JUSTICE ALITO: Can I ask you again the
11 question that Justice Gorsuch asked, and you -- to
12 which you responded by citing the de facto officer
13 doctrine. But suppose we look at that going forward,
14 rather than judging the validity of an act committed
15 between the time when a president allegedly engages
16 in an insurrection and the time when the president
17 leaves office.

18 During that interim period, would it be
19 lawful for military commanders and other officers to
20 disobey orders of the -- of the -- the president in
21 question?

22 MR. MURRAY: I'm not sure that anything
23 gives military officers the authority to adjudicate
24 effectively the -- the -- the legality of the
25 presidency.

1 JUSTICE GORSUCH: Why -- why -- why -- why
2 not? You say he's disqualified from the moment it
3 happens. Now, I understand the de facto officer
4 doctrine might be used to prohibit people from
5 seeking judicial remedies for decisions that take
6 place after the date he was disqualified.

7 But if he is, in fact, disqualified, from
8 that moment, why would anybody have to obey a
9 direction from him?

10 MR. MURRAY: Well, ultimately, there still
11 has to be some kind of procedure in place to
12 adjudicate the disqualification. Certainly, Congress
13 could impeach a sitting president, but that's the
14 only remedy I'm aware of that exists for -- for
15 removal or otherwise negating the authority of a
16 sitting president.

17 JUSTICE GORSUCH: Why?

18 MR. MURRAY: Well, the --

19 JUSTICE GORSUCH: On what theory? Because
20 Section 3 speaks about disqualification from holding
21 office. You say he is disqualified from holding
22 office from the moment it happens.

23 MR. MURRAY: Correct. But, nevertheless --

24 JUSTICE GORSUCH: So -- so it operates --
25 you say there's no -- no legislation necessary. I

1 thought that was the whole theory of your case. And
2 no procedure necessary -- it happens automatically.

3 MR. MURRAY: Well, certainly, you need a
4 procedure in order to have any remedy to enforce the
5 disqualification, which is different --

6 JUSTICE GORSUCH: I -- that's a whole
7 separate question. That's the de facto -- doesn't
8 work here. Okay? Put that aside.

9 He's disqualified from the moment.
10 Self-executing, done. And I would think that a
11 person who would receive a direction from that
12 person -- president, former president, in your view,
13 would be free to act as he or she wishes without
14 regard to that individual.

15 MR. MURRAY: I don't think so because I
16 think, again, the --

17 JUSTICE GORSUCH: Why?

18 MR. MURRAY: -- de facto officer doctrine
19 would nevertheless come into play to say this is the
20 --

21 JUSTICE GORSUCH: No, de facto -- that --
22 that doesn't work, Mr. Murray, because de facto
23 officer is to ratify the conduct that's done
24 afterwards and -- and insulate it from judicial
25 review. Put that aside. I'm not going to say it

1 again. Put it aside, okay?

2 I think Justice Alito is asking a very
3 different question and a more pointed one and a more
4 difficult one for you, I understand, but I think it
5 deserves an answer.

6 On your theory, would anything compel a
7 lower official to obey an order from, in your view,
8 the former president?

9 MR. MURRAY: I'm imagining a situation
10 where, for example, a former president was -- you
11 know, a -- a president was elected and they were 25
12 and they were ineligible to hold office --

13 JUSTICE GORSUCH: No. No.

14 MR. MURRAY: -- but, nevertheless, they
15 were put into that office --

16 JUSTICE GORSUCH: No. No. We're talking
17 about Section 3.

18 MR. MURRAY: And --

19 JUSTICE GORSUCH: Please don't change the
20 hypothetical, okay?

21 MR. MURRAY: I'm --

22 JUSTICE GORSUCH: Please don't change the
23 hypothetical. I know. I like doing it too, but
24 please don't do it, okay?

25 MR. MURRAY: Well, the -- the point I'm

1 trying to make is --

2 JUSTICE GORSUCH: He's disqualified from
3 the moment he committed an insurrection, whoever it
4 is, which -- whichever party. It -- that happens.
5 Boom. It happened.

6 What would compel -- and I'm not going to
7 say it again, so just try and answer the question.
8 If you don't want to answer it, fair enough, we'll
9 move on. What would compel a lower official to obey
10 an order from that individual?

11 MR. MURRAY: Because, ultimately, we have
12 -- we have statutes and rules requiring chains of
13 command. The person is in the office, and even if
14 they don't have the authority to hold the office, the
15 only way to get someone out of the Office of the
16 Presidency is impeachment, and so I think if you
17 interpreted Section 3 in light of other provisions in
18 the Constitution like impeachment, while they hold
19 office, impeachment's the only way to validate that
20 they don't have the ability to hold that office and
21 should be removed.

22 JUSTICE JACKSON: Mr. Murray, can I -- oh.
23 Can I just ask you about something Justice Kagan
24 brought up earlier, which is the concern about
25 uniformity and the lack thereof if states are

1 permitted to enforce Section 3 in presidential
2 elections.

3 And I guess I -- I didn't really understand
4 your argument or your response to her about that.

5 MR. MURRAY: Well, certainly if Congress is
6 concerned about uniformity, they can provide for
7 legislation and they can preempt state legislation.

8 JUSTICE JACKSON: Yes --

9 MR. MURRAY: But --

10 JUSTICE JACKSON: -- but you say that's not
11 necessary.

12 MR. MURRAY: But it's not necessary in the
13 absence of federal enforcement legislation. These
14 questions come up to this Court in the same way that
15 other federal questions come up to this Court, which
16 is that a state adjudicates them. If the state
17 hasn't provided sufficient process to comport with
18 due process and notice and opportunity to be heard,
19 one can make those challenges. But assuming, as
20 here, we have a full evidentiary record, an
21 opportunity to present evidence --

22 JUSTICE JACKSON: No, I understand -- I
23 understand that we could resolve it so that we have a
24 uniform ultimate ruling on it.

25 I guess my question is why the Framers

1 would have designed a system that would -- could
2 result in interim disuniformity in this way where we
3 have elections pending and different states suddenly
4 saying you're eligible, you're not, on the basis of
5 this kind of thing?

6 MR. MURRAY: Well, what they were concerned
7 most about was ensuring that insurrectionists and
8 rebels don't hold office. And so once one
9 understands the sort of imperative that they had to
10 ensure that oath-breakers wouldn't take office, it
11 would be a little bit odd to say that states can't
12 enforce it, that only the federal government can
13 enforce it, and that Congress can essentially rip the
14 heart out of Section 3 by a simple majority just by
15 failing to pass enforcement legislation.

16 Federalism creates redundancy. And here
17 the fact that states have the ability to enforce it
18 as well, absent federal preemption, provides an
19 additional layer of safeguards around what really
20 Section 3 --

21 JUSTICE JACKSON: Yeah, and I'll --

22 MR. MURRAY: -- supports.

23 JUSTICE JACKSON: -- ask you about the
24 history when I get a chance again. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Justice Thomas?

2 Justice Alito?

3 JUSTICE ALITO: Suppose there's a country
4 that proclaims again and again and again that the
5 United States is its biggest enemy and suppose that
6 the president of the United States for diplomatic
7 reasons think that it's in the best interests of the
8 United States to provide funds or release funds so
9 that they can be used by that -- by that country.

10 Could a state determine that that person
11 has given aid and comfort to the enemy and,
12 therefore, keep that person off the ballot?

13 MR. MURRAY: No, Your Honor. This Court
14 has never interpreted the aid and comfort language,
15 which also is present in the Treason Clause, but
16 commentators have suggested -- it's been rarely
17 applied because treason prosecutions are so rare, but
18 commentators have suggested that, first of all, that
19 aid and comfort really only applies in the context of
20 a declared war or at least an adversarial
21 relationship where there is, in fact, a war between
22 two countries.

23 And, second, the intent standard would do a
24 lot of work there because, under Section 3, whatever
25 the underlying conduct is, engaging in insurrection

1 or aid and comfort, has to be done with the intent to
2 further the unlawful purpose of the insurrection or
3 -- or to aid the enemies in their pursuit of war
4 against the United States.

5 JUSTICE ALITO: Let me come back to the
6 question of what we would do if we were -- if
7 different states had adjudicated the question of
8 whether former President Trump is an insurrectionist
9 using a different record, different rulings on the
10 admissibility of evidence, perhaps different
11 standards of proof. Then what would we do?

12 MR. MURRAY: Ultimately, this Court would
13 -- first of all, if there were deficiencies in the
14 record, the Court could either refuse to hear the
15 case or it could decide on the basis of deficiencies
16 of the record.

17 JUSTICE ALITO: Well, would we have to
18 decide what is the appropriate rule of evidence that
19 should be applied in this -- in this case? Would we
20 have to decide what is the appropriate standard of
21 proof? Would we give any deference to these findings
22 by state court judges, some of whom may be elected?
23 Would we have to have our own trial?

24 MR. MURRAY: No, Your Honor. This Court
25 takes the evidentiary record as -- as it's given.

1 And, here, we have an evidentiary record that all the
2 parties agree is sufficient for a decision in -- in
3 this case.

4 And then, as -- as I discussed earlier,
5 there's a possibility of a Bose Corp. independent
6 review of the facts, but, ultimately, what we have
7 here is an insurrection that was incited in plain
8 sight for all to see.

9 JUSTICE ALITO: Yeah, but you're really not
10 answering my question. It's not helpful if you don't
11 do that.

12 We have -- suppose we have two different
13 records, two different bodies of evidence, two
14 different rulings on questions of admissibility, two
15 different standards of proof, two different sets of
16 fact findings by two different judges or maybe
17 multiple judges in multiple states.

18 Then what do we do?

19 MR. MURRAY: Well, first, this Court would
20 set the legal standard, and then it would decide
21 which view of the record was -- was correct, I think,
22 under that -- if -- if this Court had two cases --

23 JUSTICE ALITO: Which view of -- which view
24 of what record?

25 MR. MURRAY: If this Court --

1 JUSTICE ALITO: Of which record?

2 MR. MURRAY: If this Court had two cases
3 before it and both of the records were sufficient
4 insofar as both sides had the opportunity to present
5 their case and -- and the essential facts in the
6 record that everyone agreed was sufficient for a
7 decision, then this Court would have to look at
8 the -- the evidence -- the evidence presented and
9 decide which -- which holding was correct and then
10 decide that issue for the country.

11 And, certainly, here, when -- when there is
12 a complete record, lower courts then will be applying
13 that decision and I think it's unlikely that any
14 court would say we're going to reach a different
15 decision than the U.S. Supreme Court did,
16 particularly if the Court relies on the facts, the
17 indisputable facts of what President Trump said on
18 video and in his Twitter feed, which is really the
19 essence of our case here.

20 JUSTICE ALITO: Well, you had an expert --
21 just take -- let's just take that example -- an
22 expert testify about the meaning of what President
23 Trump said. But do you -- do you think it's possible
24 that a different state court would apply Daubert
25 differently and say that this person should not be

1 allowed to express an expert opinion on that
2 question? Do you think that's beyond the realm of
3 imagination?

4 MR. MURRAY: Not -- not at all, Your Honor.
5 Two points on that. Number one, President Trump
6 didn't appeal the admission of that evidence in this
7 case, but, number two, you know, the second point is
8 that Professor Simi really -- he didn't opine on the
9 meaning of President Trump's words.

10 He opined on the effect that those words
11 had on violent extremists, and the essence of his
12 testimony was built around videotaped statements of
13 President Trump himself encouraging, inciting, and
14 praising political violence when --

15 JUSTICE ALITO: Well, I -- I'm not taking a
16 position one way or the other about whether the
17 expert's testimony should have been admitted or
18 anything like that or the meaning of President
19 Trump's words.

20 I'm just trying to get you to grapple with
21 what some people have seen as the consequences of the
22 argument that you're advancing, which is that there
23 will be conflicts in decisions among the states, that
24 different states will disqualify different
25 candidates, but I -- I'm not getting a whole lot of

1 help from you about how this would not be an
2 unmanageable situation.

3 MR. MURRAY: If this Court writes an
4 opinion affirming on the basis of the indisputable
5 facts of what President Trump said on January 6th and
6 in the weeks leading up to it and his virtual
7 confession on Twitter after the fact, then it would
8 be reversible error for any other state to conclude
9 otherwise on that question of federal law, or -- or,
10 at the very least, this Court could address that when
11 those issues come up, but it seems unlikely.

12 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

13 JUSTICE SOTOMAYOR: There's two sides to --
14 to the other side's position. The first is that it's
15 not self-executing. I want to put that aside.

16 Deal with if we were to hold that states
17 don't have the right to enforce or create a cause of
18 action in this situation. They want the flip to say
19 that nobody -- even Congress can't do it because they
20 need implementing legislation. Address that
21 argument.

22 MR. MURRAY: That -- that --

23 JUSTICE SOTOMAYOR: Because assume we rule
24 that states don't have it. What would you have us
25 say for the other side of the argument? One of my

1 colleagues says you need or what -- what not -- not
2 then Chief Justice but Circuit Court Justice Chase
3 said, which is that somehow you need implementing
4 legislation, like the 1870 Act.

5 You seem to say that's not true because
6 they could decide not to seek the -- see the
7 candidate, et cetera. So I don't know that
8 legislation's necessary.

9 MR. MURRAY: And, certainly, there are
10 historical examples of member -- members of Congress
11 under their Article -- under Congress's Article I
12 power to judge the qualifications of its members, of
13 members of Congress refusing to seat ineligible
14 candidates under Section 3 who have won election.

15 In the context of the presidency, I think
16 it would create a number of really difficult issues
17 if the Court says there's no procedure for
18 determining President Trump's eligibility until after
19 the election.

20 And then what happens when members of
21 Congress on January 6th, when they count the
22 electoral votes, say we're not going to count
23 electoral votes cast for President Trump because he's
24 disqualified under Section 3 under the Electoral
25 Count Reform Act.

1 A number of the amicus briefs, such as
2 those of Professor Ginsburg, Hassan, and Foley, have
3 made the point that that is kind of a
4 disenfranchisement and constitutional crisis in the
5 making and is all the more reason to address those
6 issues now in a judicial process on a full
7 evidentiary record so that everybody can have
8 certainty on those issues before they go to the
9 polls.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: Mr. Murray, you talked --
12 you relied on the states' extensive powers under the
13 Electors Clause. You talked about the states having
14 a role in enacting, you know, typical ballot access
15 provisions.

16 I -- I guess, you know, it strikes me that
17 we've put some limits on that. And I'll just give
18 you Anderson versus Celebrezze as an example of that,
19 where we said, in fact, states are limited in who
20 they can take off a ballot, and that was a case about
21 minor party candidates, but the reason was that one
22 state's decision to take a candidate off the ballot
23 affects everybody else's rights.

24 And we talked about the pervasive national
25 interest in the selection of candidates for national

1 office. We talked about how an individual state's
2 decision would have an impact beyond its own borders.
3 So, if that goes for minor political party
4 candidates, why doesn't it go a fortiori for the
5 situation in this case?

6 MR. MURRAY: Well, certainly,
7 constitutional principles like Section 3 apply to
8 everybody, but in Celebrezze, the issue there was a
9 First Amendment question. And, certainly, there's no
10 doubt that states' exercise of their power under
11 Article II is constrained by First Amendment
12 principles.

13 And -- and in -- in that case, the -- the
14 state law deadlines for when a minor party candidate
15 got on the ballot just came too soon to be reactive
16 to what major parties had done and, therefore, risked
17 disenfranchising people who were disillusioned with
18 who the major parties had picked and it raised First
19 Amendment problems. Here, there's no real First
20 Amendment problem and -- and a state is just trying
21 to enforce an existing qualification that's baked
22 into our constitutional fabric.

23 JUSTICE KAGAN: Yeah, I -- I guess, you
24 know, it -- it did come up in the First Amendment,
25 but there's a broader principle there and it's a

1 broader principle about who has power over certain
2 things in our federal system, and, you know, within
3 our federal system, states have great power over many
4 different areas. But that there's some broader
5 principle about that there are certain national
6 questions that -- that -- that -- that, you know,
7 states -- where states are not the repository of
8 authority. And I took a lot -- First Amendment, not
9 First Amendment -- a lot of Anderson's reasoning is
10 really about that. Like, what's a state doing
11 deciding who gets to -- who -- other citizens get to
12 vote for for president?

13 MR. MURRAY: Colorado is not deciding who
14 other states get to vote for for president. It's
15 deciding how to assign its own electors under its
16 Article II power. And the Constitution grants them
17 that broad power as --

18 JUSTICE KAGAN: Well, but the effect of
19 that is obvious, yes?

20 MR. MURRAY: No, Your Honor, because
21 different states can have different procedures. Some
22 states may allow insurrectionists to be on the
23 ballot. They may say we're not looking past the
24 papers; we're not going to look into federal
25 constitutional questions. It's the sort of -- even

1 in this election cycle, there are -- there are
2 candidates who are on the ballot in some states even
3 though they're not natural-born citizens and off the
4 ballot in other states. And that's just a function
5 of states' power to enforce -- to preserve their own
6 electors and avoid disenfranchisement of their own
7 citizens.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

10 JUSTICE GORSUCH: You haven't had a chance
11 to talk about the officer point, and I just want to
12 give you an opportunity to do that. Mr. Mitchell
13 makes the argument that particularly in the
14 Commissions Clause, for example, all officers are to
15 be commissioned by the president, seems to be
16 all-encompassing, that language. And I'm curious to
17 your response to that.

18 And along the way, if you would, I -- I --
19 I poked a little bit at the difference between
20 "office" and "officer" in the earlier discussion, you
21 may recall, but I -- I think one point your -- your
22 friends on the other side would make is, well, that's
23 just how the Constitution uses those terms. So, for
24 example, we know that the President Pro Tem of the
25 Senate and the Speaker of the House are officers of

1 the United States because the Constitution says they
2 are, but we also know that they don't hold an office
3 under the United States because of the
4 Incompatibility Clause that says they can't.

5 So maybe the Constitution to us today, to a
6 lay reader, might look a little odd in distinguishing
7 between "office" and "officer," not prepositions,
8 nouns, a distinction. But maybe that's exactly how
9 it works. Thoughts?

10 MR. MURRAY: Well, I'd start with the idea
11 that the meaning of "officer" in the 1780s was the
12 same meaning that it has today, which is a person who
13 holds an office. And, certainly, in particular
14 contexts like the Commissions Clause, it appears that
15 that's referring -- you know, that that is referring
16 to a narrower class of officers because we know that
17 there are --

18 JUSTICE GORSUCH: Except it says "all."

19 MR. MURRAY: Well, we know that there are
20 classes of officers, like the President Pro Tem, who
21 don't get their commissions from the President.

22 JUSTICE GORSUCH: Well, that's because the
23 Constitution elsewhere says that.

24 MR. MURRAY: We know that the Appointments
25 Clause refers to a class of officers who get their

1 appointment from the Constitution itself --

2 JUSTICE GORSUCH: Mm-hmm.

3 MR. MURRAY: -- rather than from
4 presidential appointment. People who get their
5 commissions from the president himself are not
6 commissioned by the president. And so, if you read
7 the Appointments Clause in line with the Commissions
8 Clause, then the Commissions Clause is really talking
9 about the president's power. If one needs a
10 commission, it's the president who grants it.

11 But I think it's important to bring us back
12 to Section 3 in particular because that was 80 years
13 --

14 JUSTICE GORSUCH: But, before -- before we
15 get to that, though, just the distinction between
16 "office" and "officer," do you -- do you agree that
17 the Constitution does make that distinction,
18 particularly with respect to the Speaker and
19 President Pro Tem?

20 MR. MURRAY: The Constitution makes that
21 distinction, but the -- at least in Section 3, an
22 officer of the United States is a person who swears
23 an oath and holds an office. Now the President Pro
24 Tem and the Speaker of the House, they don't swear a
25 constitutional oath in that capacity. They swear a

1 constitutional oath if they are a senator or
2 representative in Congress in that separate
3 non-official capacity. But I think that narrow --

4 JUSTICE GORSUCH: You agree they are
5 officers who don't hold an office?

6 MR. MURRAY: They're officers who -- who
7 may hold an office but don't swear an oath under
8 Article VI in that official capacity.

9 JUSTICE GORSUCH: Well, how can they hold
10 an office under the Incompatibility Clause? It says
11 they can't.

12 MR. MURRAY: Well, I think that's a fair
13 point, and I think that that may be an exception to
14 the general rule, and one might consider them perhaps
15 officers of the House and Senate because they are
16 appointed by those bodies and preside over those
17 bodies.

18 JUSTICE GORSUCH: Well, no, the
19 Constitution says they're officers of the United
20 States -- so -- so there are some instances when you
21 have an officer but not an office?

22 MR. MURRAY: Those may be an exceptional
23 circumstance.

24 JUSTICE GORSUCH: Okay. Okay.

25 MR. MURRAY: But I would --

1 JUSTICE GORSUCH: Thank you.

2 MR. MURRAY: You're welcome.

3 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

4 JUSTICE KAVANAUGH: The concerns of some
5 questions have been the states having such power over
6 a national office, other questions about different
7 states having different standards of proof, and they
8 seem underscored by this case, at least the
9 dissenting opinion below. Justice Samour said, "I've
10 been involved" -- "I've been involved in the justice
11 system for 33 years now, and what took place here
12 doesn't resemble anything I've seen in a courtroom"
13 and then added, "What transpired in this litigation
14 fell woefully short of what due process demands."

15 Now I don't know whether I agree or not.
16 I'm not going to take a position on that, but the --
17 the fact that someone's complaining not about the
18 bottom-line conclusion but about the very processes
19 that were used in the state would seem to -- and that
20 that would be permitted, seems to underscore the
21 concerns that have been raised about state power.
22 Just wanted to give you a chance to address that
23 because that was powerful language. Again, not
24 disagreeing about the conclusion but about the very
25 fairness of the process.

1 MR. MURRAY: Yes, Your Honor, but that
2 language was, with respect to Justice Samour, just
3 not correct. President Trump had a five-day trial in
4 this case. He had the opportunity to call any
5 witnesses that he wanted. He had the opportunity to
6 cross-examine our witnesses. He had the opportunity
7 to testify if he wanted to testify. And, of course,
8 the process was expedited because ballot access
9 decisions are always on a fast schedule.

10 But, in this whole case, from the trial
11 court all the way up to this Court, President Trump
12 has never identified a single process, other than
13 expert depositions, that he wanted to have that he
14 didn't get. He had the opportunity for fact witness
15 depositions. He had the opportunity to call
16 witnesses remotely. He didn't use all of his time at
17 trial. There was ample process here, and this is how
18 ballot access determinations in election cases are
19 decided all the time.

20 JUSTICE KAVANAUGH: Okay. Second question,
21 some of the rhetoric of your position -- I don't
22 think it is your position, but some of the rhetoric
23 of your position seems to suggest, unless the states
24 can do this, no one can prevent insurrectionists from
25 holding federal office. But, obviously, Congress has

1 enacted statutes, including one still in effect.
2 Section 2383 of Title 18 prohibits insurrection.
3 It's a federal criminal statute. And if you're
4 convicted of that, you are -- it says, "shall be
5 disqualified" from holding any office.

6 And so there is a federal statute on the
7 books, but President Trump has not been charged with
8 that. So what -- what are we to make of that?

9 MR. MURRAY: Two things, Your Honor.
10 Section 2383 was initially enacted about six years
11 before Section 3. It wasn't meant as implementing
12 legislation related to Section 3. And I would
13 emphasize that by the time that Section 3 was
14 ratified, most Confederates had already received a
15 criminal pardon.

16 JUSTICE KAVANAUGH: I guess the question is
17 --

18 MR. MURRAY: So --

19 JUSTICE KAVANAUGH: -- a little bit
20 different, which is, if the concern you have, which I
21 understand, is that insurrectionists should not be
22 able to hold federal office, there is a tool to
23 ensure that that does not happen, namely, federal
24 prosecution of insurrectionists. And if convicted,
25 Congress made clear you are automatically barred from

1 holding a federal office. That tool exists, you
2 agree, and could be used but has not -- could be used
3 against someone who committed insurrection. You
4 agree with that?

5 MR. MURRAY: That's absolutely right, Your
6 Honor. But I would just make the point that the
7 Framers of Section 3 clearly understood that criminal
8 prosecutions weren't sufficient because oftentimes
9 insurrectionists go unpunished, as was the case in
10 the Civil War, and that the least we can do is impose
11 a civil disqualification penalty so that even if we
12 don't have the stomach to throw someone in jail --

13 JUSTICE KAVANAUGH: Well, they had the quo
14 warranto provision that was in effect then from 18 --
15 1870 until 1948, but then, obviously, that dropped
16 out and hasn't been seen as necessary since then.

17 Last question. In trying to figure out
18 what Section 3 means and kind of to the extent it's
19 elusive language or vague language, what about the
20 idea that we should think about democracy, think
21 about the right of the people to elect candidates of
22 their choice, of letting the people decide? Because
23 your position has the effect of disenfranchising
24 voters to a significant degree.

25 And should that be something -- does that

1 come in when we think about should we read Section 3
2 this way or read it that way? What about the
3 background principle, if you agree, of democracy?

4 MR. MURRAY: I'd like to make three points
5 on that, Justice Kavanaugh. The first is that
6 constitutional safeguards are for the purpose of
7 safeguarding our democracy not just for the next
8 election cycle but for generations to come.

9 And, second, Section 3 is designed to
10 protect our democracy in that very way. The Framers
11 of Section 3 knew from painful experience that those
12 who had violently broken their oaths to the
13 Constitution couldn't be trusted to hold power again
14 because they could dismantle our constitutional
15 democracy from within, and so they created a
16 democratic safety valve. President Trump can go ask
17 Congress to give him amnesty by a two-thirds vote.
18 But, unless he does that, our Constitution protects
19 us from insurrectionists.

20 And, third, this case illustrates the
21 danger of refusing to apply Section 3 as written
22 because the reason we're here is that President Trump
23 tried to disenfranchise 80 million Americans who
24 voted against him. And the Constitution doesn't
25 require that he be given another chance.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Barrett?

3 JUSTICE BARRETT: So the general rule is
4 that, absent rare circumstances, state courts and
5 federal courts share authorities. State courts have
6 authority to enforce the Constitution, but there are
7 certain limits to that, certain situations in which
8 the Constitution itself preempts the state's ability
9 to resolve constitutional questions.

10 And, you know, Tarble's Case is one. And
11 you said earlier that once a president is elected,
12 you accepted that a state couldn't do anything about
13 that, like you couldn't -- Colorado couldn't enact
14 its own say quo warranto provision and then use it to
15 get the secretary of state or the president or anyone
16 else out of office.

17 And I assume that's because of this
18 principle of structural preemption. Am I right?

19 MR. MURRAY: Yes, Your Honor.

20 JUSTICE BARRETT: Okay. So I just want to
21 clarify what that means for your argument. That
22 means that your eggs are really in the basket of the
23 Electors Clause, really in the Article I basket,
24 because you're saying that even though all of the
25 questions that people have been asking have suggested

1 that there's a problem with giving a single state the
2 authority to render a decision that would have an
3 effect on a national election, but you're saying that
4 those structural concerns, which might otherwise lead
5 to the kind of result that you would accept after
6 someone is in office, are overcome by the Electors
7 Clause?

8 MR. MURRAY: Absolutely. States run
9 presidential elections. That's very clear from
10 Article II. Once states have selected the electors
11 and the electors have voted, states have no more
12 power over the candidate who has been them nominated
13 for president. But until then, the states do have
14 the power to adjudicate those issues.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Jackson?

17 JUSTICE JACKSON: So when I asked you
18 earlier about the uniformity concern and the
19 troubling potential disuniformity of having different
20 states enforce Section 3 with respect to presidential
21 elections, you seemed to point to history in a
22 certain way. You said, I think, that the Framers
23 actually envisioned states enforcing Section 3, at
24 least in some circumstances where there were
25 insurgents and Confederates.

1 And I guess in my view of the history, I'm
2 wondering, really, whether presidential elections
3 were such a circumstance, that the Framers actually
4 envisioned states enforcing Section 3 with respect to
5 presidential elections as opposed to senatorial
6 elections, representatives, the sort of more local
7 concerns.

8 So can you speak to the argument that
9 really Section 3 was about preventing the south from
10 rising again in the context of these sort of local
11 elections as opposed to focusing on the Presidency?

12 MR. MURRAY: Well, two points on that,
13 Justice Jackson. First is that, as I discussed
14 earlier, there isn't the same history of states
15 regulating ballot access at this time. So ballot
16 access rules to restrict presidential candidates
17 wouldn't have -- wouldn't have existed. They
18 wouldn't have been raised one way or another.

19 JUSTICE JACKSON: Right, but --
20

21 MR. MURRAY: So --

22 JUSTICE JACKSON: -- I'm not making a --

23 MR. MURRAY: But --

24 JUSTICE JACKSON: -- distinction between
25 ballot access and --

1 MR. MURRAY: Well --

2 JUSTICE JACKSON: -- anything else. Yeah.

3 MR. MURRAY: Understood.

4 JUSTICE JACKSON: Yeah.

5 MR. MURRAY: But the more broad point I
6 want to make is what is very clear from the history
7 is -- is that the Framers were concerned about
8 charismatic rebels who might rise through the ranks
9 up to and including the Presidency of the United
10 States.

11 JUSTICE JACKSON: But then why didn't they
12 put the word "President" in the very enumerated list
13 in Section 3? The thing that really is troubling to
14 me is I totally understand your argument, but they
15 were listing people that were barred and president is
16 not there.

17 And so I guess that just makes me worry
18 that maybe they weren't focusing on the president
19 and, for example, the fact that electors of vice
20 president and president are there suggests that
21 really what they thought was if we're worried about
22 the charismatic person, we're going to bar
23 insurrectionist electors and, therefore, that person
24 is never going to rise?

25 MR. MURRAY: This came up in the debates in

1 Congress over Section 3 where Reverdy Johnson said
2 why haven't you included president and vice president
3 in the language? And Senator Moore responds: We
4 have. Look at the language, "any office under the
5 United States."

6 JUSTICE JACKSON: Yes. But doesn't that at
7 least suggest ambiguity? And this sort of ties into
8 Justice Kavanaugh's point.

9 In other words, we had a person right there
10 at the time saying what I'm saying, the -- the
11 language here doesn't seem to include president, why
12 is that?

13 And so if there's an ambiguity, why would
14 we construe it to -- as Justice Kavanaugh pointed
15 out -- against democracy?

16 MR. MURRAY: Well, Reverdy Johnson came
17 back and agreed with that reading. "Any office" is
18 clear, the Constitution says about 20 times that the
19 presidency in office --

20 JUSTICE JACKSON: No, I'm not going to
21 that. So let me just say so your point is that
22 there's no ambiguity with -- with having a list and
23 not having "president" in it, with having a history
24 that suggests that they were focused on local
25 concerns in the south, with this conversation where

1 the legislators actually discussed what looked like
2 an ambiguity, you're saying there is no ambiguity in
3 Section 3?

4 MR. MURRAY: Let me take the point
5 specifically about electors and senators, if I might,
6 because I think that --

7 JUSTICE JACKSON: Yes.

8 MR. MURRAY: -- is important. Presidential
9 electors were not covered because they don't hold an
10 office. They vote. And this decision --

11 JUSTICE JACKSON: No, I'm talking about the
12 barred office part of this. Right?

13 MR. MURRAY: Exactly. So the barred office
14 is, if you want to include everybody, first, you have
15 to specify presidential electors because they're not
16 offices. So they wouldn't fall under any office.

17 Second of all, senators and representatives
18 don't hold office either. The Constitution tells us
19 that under the Incompatibility Clause and refers to
20 them as holding seats, not offices.

21 And so you want to make sure that there is
22 no doubt that senators and representatives are
23 covered, given that the Constitution suggests
24 otherwise, you have to include them.

25 The Constitution says the presidency holds

1 an office, as do members of this Court. And so other
2 high offices, the president, vice president, members
3 of this Court --

4 JUSTICE JACKSON: All right. Let me ask
5 you -- I appreciate that argument.

6 If we think that the states can't enforce
7 this provision for whatever reason in this context,
8 in the presidential context, what happens next in
9 this case? I mean, are -- is it done?

10 MR. MURRAY: If this Court concludes that
11 Colorado did not have the authority to exclude
12 President Trump from the presidential ballot on
13 procedural grounds, I think -- I think this case
14 would be done, but I think it could come back with a
15 vengeance because ultimately members of Congress
16 would -- may have to make the determination after a
17 presidential election if President Trump wins about
18 whether or not he is disqualified from office and
19 whether to count votes cast for him under the
20 Electoral Count Reform Act.

21 So President Trump himself urges this Court
22 in the first few pages of his brief to resolve the
23 issues on the merits, and we think that the Court
24 should do so as well.

25 JUSTICE JACKSON: And there is no federal

1 litigation, you would say?

2 MR. MURRAY: Well, that's correct, because
3 there is no federal procedure for deciding these
4 issues, short of a criminal prosecution.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Ms. Stevenson. Ms. Anderson -- no it's
8 Stevenson, I'm sorry.

9 ORAL ARGUMENT OF SHANNON W. STEVENSON

10 ON BEHALF OF RESPONDENT GRISWOLD

11 MS. STEVENSON: Mr. Chief Justice and may
12 it please the Court:

13 Exercising its far-reaching powers under
14 the Electors Clause Colorado's legislature
15 specifically directed Colorado's courts to resolve
16 any challenges to the listing of any candidate on the
17 presidential primary ballot before Coloradans cast
18 their votes.

19 Despite this law, Petitioner contends that
20 Colorado must put him on the ballot because of the
21 possibility there would be a super majority act of
22 Congress to remove his legal disability.

23 Under this theory, Colorado and every other
24 state would have to indulge this possibility, not
25 just for the primary but through the general election

1 and up to the moment that an ineligible candidate was
2 sworn into office.

3 Nothing in the Constitution strips the
4 states of their power to direct presidential
5 elections in this way. This case was handled capably
6 and efficiently by the Colorado courts under a
7 process that we have used to decide ballot challenges
8 for more than a century. And as everyone agrees, the
9 Court now has the record that it needs to resolve
10 these important issues.

11 I welcome your questions.

12 JUSTICE THOMAS: Is there an express
13 provision with respect to -- that defines what a
14 qualified candidate is?

15 MS. STEVENSON: No, Your Honor. There's
16 not an express provision. When the Colorado Supreme
17 Court looked at this, they looked at the need to be
18 qualified, plus the fact that the -- this part was --

19 JUSTICE THOMAS: So what does it say then,
20 if it is not express? How do we get to this issue of
21 qualified candidate?

22 MS. STEVENSON: What the court -- the
23 Colorado Supreme Court did -- and let me, if I could
24 have a standing objection, I do want to make the
25 argument that you shouldn't review the Court's

1 statutory interpretation.

2 JUSTICE THOMAS: No, I'm just looking at
3 the statute.

4 MS. STEVENSON: Right. What the Court did
5 was to say that we have three important provisions in
6 this section that show that candidates have to be
7 qualified. First, it requires that under 12032(a)
8 that a political party that wants to participate has
9 to have a qualified candidate.

10 It also looked at the fact that the
11 comparable write-in candidates also had to be
12 qualified.

13 JUSTICE THOMAS: I know, but this isn't a
14 write-in candidate. So we're actually talking about
15 the participation of a political party, right? We're
16 not talking about the participation of a candidate?

17 MS. STEVENSON: Sure. I think that the
18 fact that the write-in candidate also had to be
19 qualified was confirmatory of the fact that the
20 political party candidate also had to be qualified,
21 and it would be otherwise incongruous to read those
22 things differently.

23 JUSTICE THOMAS: So how is Section 3 a
24 qualification?

25 MS. STEVENSON: Under the reasoning of the

1 Colorado Supreme Court --

2 JUSTICE THOMAS: No, just on the -- on its
3 face.

4 MS. STEVENSON: A -- a candidate must have,
5 meet all the criteria for eligibility. And I don't
6 perceive any distinction between being -- meeting the
7 --

8 JUSTICE THOMAS: Okay.

9 MS. STEVENSON: -- eligibility criteria and
10 not being disqualified. There's -- I just don't see
11 any meaningful difference between those two things.

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: You -- you
14 represent the secretary of state, right?

15 MS. STEVENSON: That's correct, Your Honor.

16 CHIEF JUSTICE ROBERTS: If you're the
17 secretary of state somewhere and someone comes in and
18 says I think this candidate should be disqualified,
19 what -- what do you do next?

20 MS. STEVENSON: Administratively, and what
21 the deputy elections director testified to at the
22 hearing, is that if they obtain objective --
23 objective knowable information, the secretary can act
24 on that and inform the candidate --

25 CHIEF JUSTICE ROBERTS: So the secretary at

1 first decides whether that's objective, knowable
2 information?

3 MS. STEVENSON: In some instances. In this
4 case, the challenge was actually brought before the
5 candidate's paperwork had even been submitted, and
6 because there had already been a challenge asserted
7 and -- and put into the proper court procedure, the
8 secretary didn't even make that determination because
9 she didn't have the paperwork.

10 CHIEF JUSTICE ROBERTS: Well, what -- in
11 another case where that wasn't the procedure that was
12 filed --

13 MS. STEVENSON: Sure.

14 CHIEF JUSTICE ROBERTS: -- somebody comes
15 in, maybe they've got a stack of papers saying here's
16 why I think this person is guilty of insurrection,
17 it's not a big insurrection, something that, you
18 know, happened down -- down the street, but they say
19 this is still an insurrection, I don't know what the
20 standard is for when it arises to that.

21 MS. STEVENSON: I think anything that even
22 presented that level of controversy about one person
23 having a set of facts that they said proved this
24 would send this case to the 113 procedure that we use
25 to resolve ballot challenge issues like that. And if

1 -- if another elector or the individual who brought
2 the information didn't want to bring it, the
3 secretary herself could bring that action.

4 CHIEF JUSTICE ROBERTS: Is there a
5 provision for judicial review of secretary of state's
6 action both in Colorado and perhaps what you know
7 about other states?

8 MS. STEVENSON: Well, certainly in
9 Colorado, if -- any action that the secretary takes
10 that anyone wants to challenge, they can use the 113
11 process to do so. I think states have varying
12 degrees of that. There are certainly other states
13 that allow versions of that, and then I don't know
14 whether there are others that don't. I certainly
15 know that there are some that do.

16 JUSTICE ALITO: I think we're told that
17 there are states that do not provide for any judicial
18 review of a secretary of state's determination. Is
19 that incorrect?

20 MS. STEVENSON: No, no. I think that's
21 right, and I think there are some states that
22 actually have no mechanism, to come to, I think,
23 Justice Kagan's point, or there are some states that
24 don't have any mechanism to exclude a disqualified
25 candidate from the ballot at all. And I do want to

1 speak to that for just a minute about the actual --

2 JUSTICE ALITO: Well, wouldn't that be
3 constitutional? If the secretary of state's
4 determination was final?

5 MS. STEVENSON: I think so, under Article
6 II, the Electors Clause, Your Honor, that that be
7 would be constitutional. States get very broad
8 authority to determine how to run their presidential
9 elections.

10 JUSTICE ALITO: Could a state enact a
11 statute that provides different rules of evidence and
12 different rules of procedure and different standards
13 of proof for this type of proceeding than for other
14 civil proceedings?

15 MS. STEVENSON: Yes, Your Honor, I believe
16 it could under the same Electors Clause power.

17 JUSTICE SOTOMAYOR: That issue would be
18 determined under perhaps a different constitutional
19 provision like the Due Process Clause, correct?

20 MS. STEVENSON: Correct. The bounds of the
21 Electors Clause are other constitutional constraints,
22 which would include due process, equal protection,
23 First Amendment.

24 JUSTICE BARRETT: What's the due process
25 right? Does the candidate have a due process right?

1 What's the liberty interest?

2 MS. STEVENSON: I think it's not very
3 precisely defined in the case law, but I think there
4 is a recognition that there is a liberty interest of
5 a candidate and there is some due process interests
6 in being able to access the ballot.

7 JUSTICE BARRETT: I thought that was -- I
8 thought that was for voters. You -- you think for
9 the candidate too, that there's -- that it would be
10 taking something away from the candidate?

11 MS. STEVENSON: Certainly, yes. And I
12 think a lot of times you see that in the First
13 Amendment context where candidates can have an issue
14 about being on the ballot, but it's sort of a hybrid
15 or oftentimes First Amendment, Fourteenth Amendment,
16 Qualifications Clause, all discussed together.

17 JUSTICE BARRETT: Let me ask you a question
18 about -- just follow-up to Justice Alito. You know,
19 these decisions might be made different ways in
20 different states. Maybe a secretary of state makes
21 it in one state with very little process, or a
22 process more like Colorado's could be followed by
23 others.

24 Would our standard of review of the record
25 vary depending on the procedure employed by the

1 state?

2 MS. STEVENSON: I think this Court has
3 tremendous discretion to decide its standard of
4 review, and it might be based on the process that was
5 employed by an individual state. I think you could
6 exercise the independent review of Bose Corp. that
7 Mr. Murray talked about, or you could give deference
8 where you have a full-blown proceeding like the one
9 here that had all the protections of Rules of
10 Evidence and cross-examination and things like that.

11 CHIEF JUSTICE ROBERTS: You -- I'm sorry.
12 You think we should give deference in reviewing the
13 factual record, the legal conclusions? What -- in
14 other words, we shouldn't undertake a de novo review?

15 MS. STEVENSON: I don't think the review
16 should be de novo. However, I -- I am amenable to
17 the suggestion that the Court would do the Bose
18 Corp.-type independent review that might provide
19 greater certainty to states around the country as to
20 what the Court's position is on the factual record in
21 this case.

22 CHIEF JUSTICE ROBERTS: Of course, if it
23 were not de novo review, we could reach disparate
24 results even on the same record, right?

25 MS. STEVENSON: I -- I think that's

1 possible.

2 JUSTICE KAGAN: I take it your position is
3 that this disqualification is really the same as any
4 other disqualification, age or residence or what have
5 you.

6 MS. STEVENSON: That's correct.

7 JUSTICE KAGAN: And -- and -- and what if I
8 were to push back on that and say, well, this
9 disqualification, number one, it's in the Fourteenth
10 Amendment, and the point of the Fourteenth Amendment
11 was to take away certain powers from the states?
12 Number two, Section 3 itself gives Congress a very
13 definite role, which Mr. Mitchell says is interfered
14 with by the ability of states to take somebody off
15 the ballot? And maybe, number three, it's just more
16 complicated and more contested, and, if you want,
17 more political? And why don't all of those things
18 make a difference in our thinking about this
19 qualification as opposed to any other?

20 MS. STEVENSON: And so, Your Honor, I think
21 the trouble with the -- categorizing the insurrection
22 issue as -- as necessarily more difficult is it's
23 just an assumption that's coming up, I think, because
24 of this case.

25 And, again, back to the Chief Justice's

1 point, we could have a very easy case under the
2 Fourteenth Amendment with an avowed insurrectionist
3 who, you know, came in and wrote on his paperwork: I
4 engaged in an insurrection in violation of the
5 Fourteenth Amendment. And it would be open-and-shut
6 case as to whether or not that person would meet the
7 qualifications to be on the Colorado ballot.

8 With respect to your other questions about
9 the Fourteenth Amendment, my positions are based on
10 the assumption that, under the Fourteenth Amendment,
11 the states have the power to enforce Section 3, just
12 like they do other presidential qualifications, and I
13 would defer to the electors arguments on those
14 points.

15 JUSTICE ALITO: Suppose a state that does
16 recognize non-mutual collateral estoppel makes a
17 determination, using whatever procedures it decides
18 to adopt, that a particular candidate is an
19 insurrectionist.

20 Could that have a cascading effect, and so
21 the decision by a court in one state -- the decision
22 by a single judge whose factual findings are given
23 deference, maybe an elected trial judge, would have
24 potentially an enormous effect on the candidates who
25 run for president across the country? Is that

1 something we should be concerned about?

2 MS. STEVENSON: I think you should be
3 concerned about it, Your Honor, but I think the
4 concern is not as high as maybe it's made out to be
5 in particularly some of the amicus briefs. And,
6 again, under Article II, there is a huge amount of
7 disparity in the candidates that end up on the ballot
8 on -- in different states in every election.

9 Just this election, there's a candidate who
10 Colorado excluded from the primary ballot, who is on
11 the ballot in other states even though he is not a
12 natural-born citizen. And that's just -- that's a
13 feature of our process. It's not a bug.

14 And then I think, with respect to the
15 decision-making and -- you know, we're here so that
16 this Court can give us nationwide guidance on some of
17 the legal principles that are involved. I think that
18 reduces the potential amount of disparity that would
19 arise between the states.

20 And then with respect to the factual record
21 and how that gets issued and implemented, the states
22 have processes for this. And I think we need to let
23 that play out and accept that there may be some
24 messiness of federalism here because that's what the
25 Electors Clause assumes will happen. And if

1 different states apply their principles of -- of
2 collateral estoppel and come to different results,
3 that's okay. And -- and Congress can act at any time
4 if -- if it thinks that it's truly federalism run
5 amok.

6 CHIEF JUSTICE ROBERTS: Justice Thomas,
7 anything further?

8 Justice Alito?

9 JUSTICE ALITO: Well, just one further
10 question, and it's along the same lines of a lot of
11 other questions. We have been told that if what
12 Colorado did here is sustained, other states are
13 going to retaliate and they are going to potentially
14 exclude another candidate from the ballot. What
15 about that situation?

16 MS. STEVENSON: Your Honor, I think we have
17 to have faith in our system that people will follow
18 their election process -- processes appropriately,
19 that they will take realistic views of what
20 insurrection is under the Fourteenth Amendment.
21 Courts will review those decisions. This Court may
22 review some of them.

23 But I don't think that this Court should --
24 should take those threats too seriously in its
25 resolution of this case.

1 JUSTICE ALITO: You don't think that's a
2 serious threat?

3 MS. STEVENSON: I -- I think we have
4 processes --

5 JUSTICE ALITO: We should proceed on the
6 assumption that it's not a serious threat?

7 MS. STEVENSON: I think we have
8 institutions in place to handle those types of
9 allegations.

10 JUSTICE ALITO: What -- what are those
11 institutions?

12 MS. STEVENSON: Our -- our states, their
13 own electoral rules, the administrators who enforce
14 those rules, the courts that will review those
15 decisions, and up to this Court to ultimately review
16 that decision.

17 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

18 Justice Kagan?

19 Justice Gorsuch?

20 Justice Kavanaugh?

21 Justice Barrett?

22 Justice Jackson? Anything further?

23 Thank you counsel.

24 MS. STEVENSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

1 Mitchell?

2 REBUTTAL ARGUMENT OF JONATHAN F. MITCHELL

3 ON BEHALF OF THE PETITIONER

4 MR. MITCHELL: Both Mr. Murray and Ms.

5 Stevenson rely heavily on the Electors Clause and the
6 authority that it gives the legislature of each state
7 to direct the manner of appointing presidential
8 electors.

9 But that prerogative under Article II must
10 be exercised in a manner consistent with other
11 constitutional provisions and restrictions. And
12 Justice Kagan alluded to one of those restrictions
13 that might be imposed by the First Amendment, but
14 there are others.

15 A state cannot use its power under Article
16 II's Electors Clause to instruct its presidential
17 electors only to vote for white candidates. That
18 would violate the Equal Protection Clause, but nor
19 can it exercise its power in a manner that would
20 violate the constitutional holding of U.S. Term
21 Limits against Thornton and they cannot use the
22 Electors Clause as an excuse to impose additional
23 qualifications for the presidency to go beyond what
24 the Constitution enumerates in Article II.

25 And the problem with what the Colorado

1 Supreme Court has done is they have in a way changed
2 the criteria in Section 3 by making it a requirement
3 that must be met before the candidate who is seeking
4 office actually holds the office effectively moving
5 forward in time the deadline that the candidate has
6 for obtaining a congressional waiver.

7 There has still been no answer from the
8 Anderson litigants on how to distinguish the
9 congressional residency cases, where the courts of
10 appeals, not decisions from this Court, but the
11 courts of appeals in applying this Court's holding in
12 U.S. Term Limits have unanimously disapproved state
13 laws requiring congressional candidates to show that
14 they inhabit the state from which they seek election
15 prior to Election Day.

16 And there is still in our view no possible
17 way to distinguish those from the situation below in
18 the Colorado Supreme Court.

19 Mr. Murray also invoked the de facto
20 officer doctrine as a possible way to mitigate the
21 dramatic consequences that would follow from the
22 decision of this Court that rejects the rationale of
23 Griffin's case and that also agrees with Mr. Murray's
24 contentions that President Trump is disqualified from
25 holding office on account of the events of January

1 6th and that he's covered by Section 3 as an officer
2 of the United States.

3 This Court's recent decisions in Lucia and
4 Arthrex held that officers who are unconstitutionally
5 appointed under Article II and that made decisions
6 under the APA that were attacked as invalid, those
7 decisions were still vacated and this Court did not
8 use any variant of the De Facto Officer Doctrine to
9 salvage the decisions that were made by these
10 unconstitutionally appointed officers.

11 There is no way to escape the conclusion
12 that if this Court rejects Griffin's case, and also
13 agrees with Mr. Murray's construction of Section 3,
14 that every executive action taken by the Trump
15 administration during its last two weeks in office is
16 vulnerable to attack under the APA and, further, that
17 if President Trump is reelected and sworn in as the
18 next president, that any executive action that he
19 takes could be attacked in federal court by anyone
20 who continues to believe that President Trump is
21 barred from office under Section 3.

22 I'm happy to answer any other questions
23 that the Court may have.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MR. MITCHELL: Thank you.

1 CHIEF JUSTICE ROBERTS: The case is
2 submitted.

3 (Whereupon, at 12:17 p.m., the case was
4 submitted.)

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